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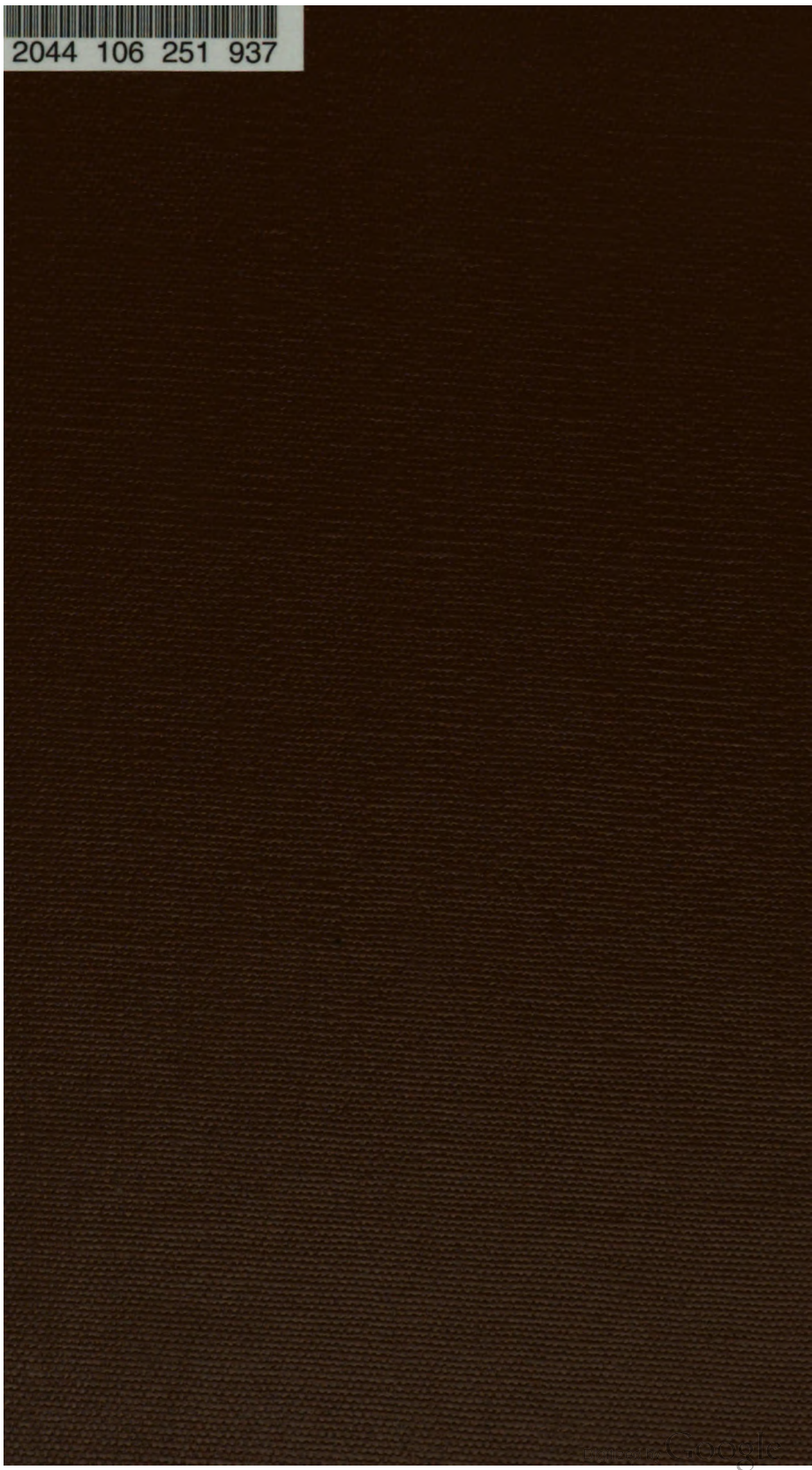
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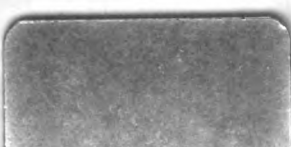
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THE
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CASES DETERMINED IN THE COURT OF APPEAL
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FOR ONTARIO.

1905.

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On the 16th of October, 1905, the Honourable Sir WILLIAM MULOCK, K.C.M.G., one of His Majesty's Counsel, was appointed Chief Justice of the Exchequer Division of the High Court of Justice.

On the 11th of November, 1905, the Honourable RICHARD MARTIN MEREDITH, one of the Justices of the Chancery Division of the High Court of Justice, was appointed a Justice of Appeal in the place of the Honourable JAMES MACLENNAN, appointed a Judge of the Supreme Court of Canada.

On the 17th of November, 1905, JAMES PITT MABEE, one of His Majesty's Counsel, was appointed a Justice of the Chancery Division.

ERRATA.

**Page 499, headlines, head-note, and page 500, line 5, for "ch. 129," read
"ch. 127."**

**Page 555, line 2, after the word "authority," insert the words "to the
contrary."**

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REPORTS OF CASES
DETERMINED IN THE
COURT OF APPEAL
AND IN THE
HIGH COURT OF JUSTICE FOR ONTARIO.

[MACMAHON, J.]

WESTON V. SMYTHE.

1905

April 1-

Deed—Description—House—Wall—Northerly Face of—Deviation in—Right to Follow—Intersection.

In a deed conveying land on which was erected a house which immediately adjoined another house to the north, one of the metes and bounds was, commencing from the intersection with the street of the production easterly to the street line of the northern face of the wall of the house upon the land conveyed, and running westerly along the production and limit between the house conveyed and the adjoining one, to the westerly limit of the lot. Where the said wall of the house conveyed extended beyond the rear wall of the adjoining house, it was cased with brick, nine inches thick, so as to cause it to project that distance beyond what would otherwise have been the division line between the two houses :—

Held, that the word "intersection" here meant "to divide or separate," and the northerly face of the wall must be followed no matter how devious its course might be, so as to include the northerly face of the brick casing.

THIS was an action tried before MACMAHON, J., without a jury, at Toronto, on the 7th March, 1905.

A. H. Sinclair and *W. A. MacMaster*, for the plaintiff.

R. G. Smyth and *J. Tytler*, for the defendant.

The plaintiff claimed that, under the description contained in the deed of conveyance of certain lands and premises, known as No. 232 Euclid Avenue in the city of Toronto, nine inches of land, situated on the northerly part of the said lands, were

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included in the metes and bounds thereof; and he asked for a declaration declaring that he was entitled to the nine inches, and for an injunction restraining the defendant from entering upon and interfering with the plaintiff's possession thereof.

In addition to the facts set out in the judgment, it appeared that a Mrs. Wood had mortgaged the lands and premises on which the houses Nos. 230, 232 and 234 were situated, to the North British Mortgage Company, and that default having been made in the payment of the mortgage money foreclosure proceedings had been taken, and the mortgagor's title and interest therein foreclosed, and that the company had then conveyed houses Nos. 232 and 234 to the plaintiff and the defendant respectively on the dates specified in the judgment.

The learned Judge, after hearing the evidence, found as follows:—

April 1. MACMAHON, J. :—I make the following findings:—

About the year 1880 Mrs. Wood purchased the land on which the three houses numbered 230, 232, and 234 on the west side of Euclid Avenue, in Toronto, are built.

At the time she purchased the only building on the property was what is now known as house number 232, and it was then what is called a "shell." Mrs. Wood, on becoming the owner, lathed and plastered the house on the outside, converting it into a roughcast house.

About two years after purchasing she built the houses 230 to the south and 234 to the north of number 232. The walls of these houses from the foundations up were of stone and brick and formed separate and distinct houses. Part of the north wall of number 230 extends thirteen feet three inches nearer to the street line of Euclid Avenue than the south wall of number 232, and the remainder of the north wall of 230 was built close up to the south wall of 232. And part of the south wall of 234 extends thirteen feet three inches nearer to the street line of Euclid Avenue than the north wall of number 232 does, while the remainder of the south wall of 234 was built close up to the north wall of number 232.

The deed from the North British Canadian Investment Company to the plaintiff bears date the 23rd February, 1903,

and describes the land sold to the plaintiff as "commencing at a point on the western limit of Euclid Avenue where it is intersected by the production easterly of the southern face of the southern wall of house number 232 (that is, where the northern wall of number 230 joins the southern wall of 232) said point being distant 32 feet and 6 inches more or less measured northerly along said limit of Euclid Avenue from southern limit of said lot number one. Thence northerly along said avenue 20 feet 6 inches more or less to the intersection of production easterly of northern face of northern wall of house 232. Thence westerly along said last production face of wall and limit between premises in rear of houses numbers 232 and 234, in all, one hundred and twenty-nine feet to eastern limit of lane. Thence southerly," etc.

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The word "intersection" usually means "The place where two things intersect or cross." It has, however, another meaning, although rarely applied, "To divide or separate (two things) by passing between them" (Murray's Dictionary); and it is in this latter sense it was intended to be used, that is, the dividing line between the two houses.

The North British Canadian Investment Company conveyed to the defendant by deed, dated 23rd October, 1903, house number 234, (together with other lands), described as, "Commencing at the said westerly angle of said lot number 4, now defined by production easterly of southern face of southern wall of house number 234 to Euclid Avenue. Thence northerly along the western limit of Euclid Avenue seventeen feet," etc.

If, immediately after the erection of number 234, number 232 had been sold by the description contained in the deed to the plaintiff, the controversy which culminated in the present litigation could not have arisen, for the whole of the northern wall of number 232 had been plastered from front to rear, and that formed the "northern face of the northern wall of house number 232," and the "production easterly" of the northern face of that wall would be on the line where it abuts on the brick wall of number 234, and which would have formed a straight line through to the easterly or front conterminous boundary between the two houses. But two years after number 234 was built, Mrs. Wood added a facing of brick nine inches

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thick to the north wall of 232 from where the rear wall of 234 ended to the rear of the wall of 232, a distance of 32 feet 6 inches; and the plaintiff claims that, according to the description in the conveyance to him the "production easterly of the northern face of the northern wall of house number 232" means the production easterly from the west corner of number 234 along the face of the brick wall of number 232, which would carry the line through the south wall of number 234 from the point where the wall of number 232 strikes it on the west end to the front of number 234.

W. A. Brown, the surveyor who made the survey and prepared for the North British Company the description embodied in the conveyance to the plaintiff, and also prepared a plan put in at the trial, said that measuring 20 feet 6 inches from the intersection of the walls of numbers 230 and 232 reached exactly to the dividing line between houses 232 and 234, thus giving to the plaintiff the full width of 20 feet 6 inches in the front of house number 232, as called for by his deed.

Had Mrs. Wood built from the west end an addition say twenty feet long by five feet in width, along the north side of number 232, and the description had been, "thence northerly along said avenue 20 feet 6 inches more or less to the intersection of production easterly of northern face of northern wall of house number 232," it could hardly be contended that it meant the production easterly along the face of the twenty-foot addition, although that would have been the largest face on the north side of number 232. For if that contention were to prevail it would have cut off from the defendant and given to the plaintiff five feet of house number 234 through to the front. According to my view, the description intends that the northern face of the northern wall of number 232, no matter how devious its course may be, is to be followed and produced easterly through the intersecting or dividing line between houses 232 and 234.

If I am right in the conclusion that the northern face of the northern wall of number 232 is that wall which runs from the front or easterly junction of the two houses westerly through and along where the wall of number 232 abuts on the wall of

number 234, and from such junction ends at the rear of number 234 along the face of the brick wall of 232 (added by Mrs. Wood) to the rear of that house, then all the plaintiff is entitled to recover is the land described in a conveyance thereof from the defendant and his wife to the plaintiff bearing date the 18th August, 1904.

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[IN THE COURT OF APPEAL]

WEDDELL ET AL. V. RITCHIE ET AL.

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May 9.

Railway—Bondholders—Right to Vote—Scope of—Number of Votes—Construction of Statutes—36 Vict., ch. 73, sec. 15 (O.)—45 Vict., ch. 61, secs. 6, 7 (O.).

A Provincial Act applicable to the bonds of a railway company provided that —“In the event at any time of the interest upon the bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders”.—

Held, that the bondholders' right to vote might be exercised at any time when interest was in arrear, and was not restricted to the one general annual meeting next after the interest fell into arrear.

Held, also, OSLER and MACLAREN, JJ.A., dissenting, that each bondholder had one vote for every \$100 of his bond, the shares being \$100 shares.

Held per OSLER and MACLAREN, JJ.A., that each bondholder had as many votes as he had bonds and no more.

THIS was an appeal from the judgment of Meredith, C.J., C.P., delivered November 15th, 1904, whereby it was declared that the plaintiffs, Robert Weddell and Thomas Gibbs Blackstock, were entitled to vote at the last annual general meeting of the Central Ontario Railway.* There was also a cross appeal by the plaintiffs on the question of the extent of the bondholders' right of voting.

* The name of the railway company was changed from “The Prince Edward County Railway Company” to “The Central Ontario Railway” by 45 Vict. ch. 61 (O).—REP.

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The statutory enactment upon which the questions depended and the other facts of the case appear from the judgments.

The appeal was argued on February 9th, 1905, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and *J. H. Moss*, for the defendants, appellants, contended that the bonds were not issued under sec. 6 of 45 Vict. ch. 61 (O.), and never carried with them any voting power; that the company acted under the general provisions of sec. 7; that Provincial Acts by no means always gave bondholders a right to vote on their bonds.

G. T. Blackstock, K.C., for the plaintiffs, contended that whether issued under a mortgage or not, the bonds were all issued under the same Act, 45 Vict. ch. 61 (O.), which goes on to say, in sec. 6 (4), that all bonds issued under it shall carry the right to vote as provided by 36 Vict. ch. 73, sec. 15 (O.); that the words, "under the terms of this Act," in sec. 6 (4), cannot be cut down to read, "under a certain section of this Act."

May 9. MOSS, C.J.O.:—The only question raised by the defendants' appeal, and the principal question raised in the action, is whether the holders of the bonds issued by the defendants, the Central Ontario Railway Co. on or about the 1st of April, 1882, and which bonds are secured by a first mortgage deed of trust bearing the same date, are entitled to vote in respect of such bonds at a general annual meeting of the company when the interest upon them is in arrear.

The other questions raised by the plaintiffs are (1) whether, assuming the right to vote, it can be exercised at every general meeting while the interest is in arrear, or whether it is confined to the general meeting next following the arrear, and (2) whether the holder of a bond is entitled to a vote in respect of every \$100 represented by the bond.

The solution of the first question turns upon the construction to be placed upon the language of the Act 45 Vict. ch. 61 (O.), and particularly upon secs. 6 and 7. Prior to the passing of that Act the power of the company to issue bonds was governed by the provisions of the Act of incorporation, 36 Vict.

ch. 73 (O.), supplemented by 37 Vict. ch. 60 (O.) and 44 Vict. ch. 72 (O.)

None of these Acts enabled the company to create a mortgage for securing payment of their bonds or gave them power to issue bonds under the General Railway Act of Ontario.

But by sec. 15 of 36 Vict. ch. 73 (O.) it was enacted that the bonds of the company should, without registration or formal conveyance, be taken and considered to be the first and preferential claims and charges upon the undertaking, real property, rolling stock and equipment then existing or at any time thereafter acquired, "provided that in the event at any time of the interest of the said bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company, all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders—provided that the bonds and any transfers thereof shall have been first registered," as directed.

Before the Act 45 Vict. ch. 61 (O.) was passed, in the year 1882, there had been an issue of bonds, and one object of this Act was to enable the company to increase its bond indebtedness to \$20,000 a mile. And in furtherance of the object two methods of issuing and securing bonds were provided—the one method similar to that which the company had always been authorized to adopt, the other method new so far as the company was concerned. The company were authorized by sec. 6 to issue bonds up to the increased amount, all to be a claim and charge upon the whole line or to be divided and made a claim and charge upon specified sections of the railway. Then followed the provision of sec. 6, sub-sec. (4) declaring that the provisions of secs. 15 and 17 of ch. 73 of the 36 Vict. as to rights and security of the bondholders, and the form of bonds and other obligations, shall apply to all bonds that may be issued under the terms of "this Act" in so far as they are not inconsistent therewith.

And then by sec. 7 it is enacted that the company may, instead of availing itself of the provisions above contained, issue bonds and create a mortgage under the provisions of sec. 9 (11) of the Railway Act of Ontario. But this section (7) was not to become an effective part of the Act without the consent

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in writing of the holders of the outstanding bonds; and sec. 9 of the Railway Act of Ontario was made applicable to the company, but nothing was to be done under the foregoing provisions of sec. 7 which would impair the security of the present holders of bonds on the already constructed portions of the road.

Here is a new right given for the first time to the company, enabling them to issue bonds in a certain way conditioned upon the performance by the company of certain things required to be done for the security of the holders of the outstanding bonds; without the performance of these conditions no bonds could issue under the provisions of sec. 7 of the Act. Can it be said that bonds issued after compliance with these conditions are not bonds issued under the terms of this Act, by the authority of which alone they could issue? Unless they were issued under and in compliance with the terms of that Act they could not issue at all. And unless there is something in the context necessarily and imperatively confining the operation of the words "issued under the terms of this Act" to the bonds authorized to be issued under sec. 6, they should be held to apply to every part of the Act. It is not inconsistent with any language of the Act to say that the holders of bonds issued under sec. 7 shall, in addition to the security of a mortgage given in lieu of a general lien or charge upon the company's undertaking and assets, have the right of voting in respect of the bonds of which they are the owners. That the security of a mortgage and the right to vote in respect of bonds may co-exist is recognized in the Act 53 Vict. ch. 45 (O.), now embodied in R.S.O. 1897 ch. 207, sec. 9 (20) and (22).

Then, if the right of voting exists, the fair reading of the language of sec. 15 of the Act 36 Vict. ch. 73, is that it may be exercised at any time when interest is in arrear. It could not have been intended that it should be restricted to the one general annual meeting next after the interest fell into arrear, and that it was not to be exercised at another meeting although the arrear continued. The language does not drive one to that conclusion, and in view of the end manifestly aimed at, that construction should be adopted which will secure to the bondholders a voice in the affairs of the company as long as their interest is in arrear.

The question as to the extent of the voting power is one of more difficulty. But the language of sec. 15—"all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders"—is very comprehensive. It implies equality with the shareholders in every respect as regards directors and voting. It is not dealing with these rights, privileges, and qualifications as between the bondholders themselves, but as between them and the shareholders. And as against the latter the bondholders are given the same rights, privileges and qualifications for directors and voting. The only just way of effecting this is by giving to each holder of a bond one vote for each portion equivalent to the amount of one share. Thus, each share being for \$100, each holder of a bond for a \$1,000 should be upon an equal footing with the holder of 10 shares. If this be not so the shareholders have an advantage over the bondholders in regard to directors and voting, and the latter do not possess the same rights, privileges, and qualifications in these respects as are attached to shareholders.

The appeal should be dismissed and the cross appeal allowed with costs.

OSLER, J.A.:—While I am not prepared absolutely to dissent from the view which I understand the rest of the Court take of the first point argued, I yet cannot say I am entirely satisfied that sec. 15 of the Act incorporating the company, 36 Vict. ch. 73 (1873), applies to the mortgage bonds issued by authority of sec. 7 of their later Act, 45 Vict. ch. 61 (1882), under the provisions of sec. 9 (11) of the general Railway Act of Ontario. Section 7 seems to contrast these very forcibly with those which may be issued under the provisions of sec. 6. Among the provisions which apply to the latter are those of sub-sec. 4 of that section, which attach to such bonds the provisions of secs. 15 and 17 of the Act of 1873. True it is that the fourth sub-section of sec. 6 says that those provisions shall apply to *all bonds that may be issued under the terms of this Act*, but following as it does the preceding sub-sections which provide for and define the terms on which the bond-issuing powers conferred by the section may be exercised, and which do not appear

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to contemplate the grant of the alternative powers mentioned in the next section, it would seem naturally to refer exclusively to bonds issued under the section of which it forms part. Thus sec. 7 begins by apparently excluding sec. 6 altogether from having any operation upon the powers conferred by it. "The company may *instead of availing themselves of the provisions above contained*"—some of which are those mentioned in sub-sec. (4) of sec. 6, by which the provisions of secs. 15 and 17 of the Act of 1873 were applied to bonds issued under sec. 6—create mortgage bonds under sec. 9 (11) of the General Act. And the company availed itself of the powers conferred by sec. 7, and not then conferred by sec. 6. The words of sub-sec (4) are, however, very comprehensive, and sec. 7 contains something more than a mere authority to issue bonds under the provisions of General Act, and itself specifies certain terms which shall apply to such bonds, so that it may perhaps properly enough be said that these bonds, as well as those mentioned in sec. 6, are good under the terms of the Act. Whichever power the company might choose to avail itself of, the bonds issued in pursuance of it would be mortgage bonds, and it is not probable that the legislature meant to place bondholders deriving under sec. 7 in a less advantageous position than those who might have come into existence if the company had acted under sec. 6.

The principle of construction on which *Washington v. Grand Trunk R.W. Co.*, (1897) 28 S.C.R. 184, [1899] A.C. 275, was decided favours also the view which is contended for by the plaintiffs.

I think also that the bondholders' right to vote exists at the next general annual meeting of the company held at any time when the interest on the bonds remains or is in default. The right is a continuing one while the interest is in default. I think that is the proper construction of sec. 15 of the Act of 1873. The construction contended for would lead to the absurd result that the worse the situation of the bondholders became the less would be their right to a voice in the control of the company.

The question of how many votes the bondholder is entitled to was not considered by Meredith, C.J. I think he has as many votes as he has bonds, but no more. In that way

he has "the same rights, and privileges, and qualifications . . . for voting as are attached to shareholders" (sec. 15). One share, one vote (sec. 19). And apart from statutory authority or a valid by-law of the company, a shareholder could have no more, no matter how many shares he held: Lindley on Companies, 6th ed., p. 429. It is no doubt a pecuniary qualification in one sense in either case, but in the one it is represented by the share, in the other by the bond.

The share must be for \$100, and though not paid up, the shareholder may vote in respect of it if all calls have been paid thereon (and on all stock held by him): sec. 20 of the Act of 1873.

The bond represents its full face value though it may have been issued at a discount, and must not be for less than \$100: General Railway Act, 1877, sec. 9 (11). That is the normal amount though it may be for more, but if for more need not be for an amount made up of even sums of \$100, but may be for \$150, \$350, \$850, or any other sum the company and the purchaser may agree upon. There is no reason why he should not require the company to issue separate bonds for \$100 to the amount he has agreed to buy, but when his right to vote arises he votes *qua* bondholder as does the other *qua* shareholder, and if he is the holder of a single bond for \$1,000 or of two for \$350 there is no authority in the statute or elsewhere that I am aware of for saying that they are to be regarded as equivalent to ten shares in the one case or seven in the other, or to separate securities for thousands into securities for sums of one hundred dollars even, or the equivalent for so many shares of \$100.

On this point I think the plaintiffs are not entitled to the declaration they ask for and that their cross appeal should be dismissed.

MACLENNAN, J.A.:—I am of opinion that the judgment is right, and I do not think it necessary to add much to the reasons given therefor by the learned Chief Justice.

The first question is whether the proviso at the end of sec. 15 of the company's original Act of incorporation, 36 Vict. ch. 73, is applicable to the existing bond issue bearing date the

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1st of April, 1882. That proviso gave the holders of a previous issue of bonds the same rights and privileges and qualifications for directors and for voting as were attached to shareholders, provided the bonds were registered in the same manner as shares.

The question depends on the construction of secs. 6 and 7 of a subsequent Act relating to the same company: 45 Vict. ch. 61 (O.)

The original Act made no provision for a mortgage to secure the bond issue, but merely made the bonds, without registration or formal conveyance, a first and preferential claim and charge on the undertaking, real property, rolling stock and equipment of the company.

When the Act 45 Vict. ch. 61 (O.) was passed the original issue of bonds was still outstanding, and sec. 6 authorized the company to increase its bond indebtedness to a sum not exceeding \$20,000 per mile of the line completed and actually under construction. That is the substantial matter of the section, although it includes some matters incidental to the main matter, and among other things declares that the provisions of secs. 15 and 16 of the original Act as to the rights and security of the bondholders, and the form of bonds and other obligations, shall apply to all bonds that may be *issued under the terms of this Act* in so far as they are not inconsistent therewith.

That was one mode of proceeding which the company might have followed. They might have left the old bonds outstanding and have made a new issue, the sum of both not exceeding \$20,000 per mile. The new bonds, like the old, would be a mere charge, and there would be no mortgage of the railway or of the company's property.

Then followed sec. 7, which provided that the company might, "instead of availing themselves of the provisions above contained," issue bonds and create a mortgage under the provisions of sub-sec. 11 of sec. 9 of the Railway Act of Ontario, the issue not exceeding \$20,000 a mile, and that the company might exchange the new issue with the holders of the old issue, provided their consent was obtained.

The company proceeded under the second alternative method, that authorized by sec. 7, issued their new bonds as provided

by the Railway Act, secured by a mortgage to a trustee, and exchanged the new bonds for the old.

It is argued that although, if the company had acted under sec. 6, there could be no doubt that the proviso in sec. 15 of ch. 73 would be applicable, yet because they acted under sec. 7 the proviso could not apply. I cannot accede to that view. The substantial thing provided for by both sections is a new bond issue, either in addition to the old or in substitution for the old, and what sub-sec. 4 says is: "all bonds that may be issued under the terms of this Act," so far as not inconsistent therewith, shall be subject to the provisions of secs. 15 and 17 of ch. 73. As pointed out by the learned Chief Justice, it is not under the terms of this *section*, but under the terms of this *Act*, and it cannot be denied that these bonds were issued *under the terms of this Act*. I think it would require something express to exclude the application of those words to the new bonds, for *prima facie* they are made applicable in clear and distinct terms. I think the words which are supposed to exclude them mean no more than this—that the company may issue their new bonds either in the manner provided in the original Act of incorporation or that provided by the Railway Act. In either case they would be bonds issued under the terms of this Act, to which sec. 15 of the original Act would be applicable by virtue of sec. 6 (4).

It was further contended that the statute restricted the right of voting and being elected to the board by bondholders to the first annual meeting after default in payment of interest. I agree with the judgment that such is not the fair meaning of the language of the proviso. The words are: "In the event at any time of the interest upon the said bonds *remaining* unpaid and owing, then at the *next* ensuing general annual meeting," etc. Next to what? It is not next to the interest *falling due* or *becoming* in default, so as to make it next after a fixed date, but after the interest *remaining unpaid*, and *at any time*, then at the next general annual meeting the right of voting may be exercised. As remarked by the learned Chief Justice, the language used is obscure and not clearly expressed, but such, I think, is its proper meaning and construction. The language is made clear in the amendment to the Railway Act, 53 Vict. ch. 45, s. 2, and

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afterwards in the Railway Act, R.S.O. 1897 ch. 207, sec. 9 (23).

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It was also contended before us that the clause was ineffective and inoperative because it was not provided whether a bondholder was to have one or more votes. What is provided is that all holders of bonds shall have and possess *the same* rights and privileges and qualifications for directors and for voting as are attached to shareholders. I think this presents no difficulty. By sec. 5 of 36 Vict. ch. 73 (O.) shares are to be \$100 each, and by sec. 19 a shareholder has one vote for each share held by him. By the Railway Act R.S.O. 1897 ch. 207, sec. 19 (b), no bond or debenture is to be less than a hundred dollars, and by sec. 12 of 36 Vict. ch. 73 (O.), a director must hold ten shares. The qualification for voting and for election as a director is therefore a money qualification—one share of \$100 and ten shares fully paid up in one case and in the other. To give bondholders *the same* rights and privileges and qualifications for directors and for voting as are attached to shareholders, it is plain that a bondholder must have one vote for every \$100 of bonds held by him, and must be qualified for election as a director if he holds bonds to the amount of \$1,000—the equivalent in the one case of one share and in the other of ten shares.

It was also contended that Ritchie was entitled to vote on bonds although they were not registered. I think there is no ground for that contention in the face of the proviso contained in sec. 15 of 36 Vict. ch. 73 (O.), expressly stipulating that the bonds and other transfers thereof must have been registered.

The appeal must be dismissed.

GARROW, J.A., concurred.

MACLAREN, J.A. :—I agree with the conclusion arrived at by the majority of the Court except upon one point—that is, upon the extent of the voting power vested in the holders of bonds.

In the case of shareholders it is well settled that if nothing is said in the statute or other determining instrument or authority, each shareholder would have only one vote no matter how many shares he might hold. And where a vote is given for

each share, in the absence of a provision to the contrary, a shareholder who had paid only five per cent. on his shares would have the same voice as one whose stock was fully paid up, provided the former was not in arrear for calls: *Purdom v. Ontario Loan and Debenture Co.* (1892), 22 O.R. 597. It is, consequently, not the amount he has paid or the amount he would be entitled to in case of a liquidation or a distribution of the assets of the company that determines the voting power of a shareholder.

So in the case of the bondholder. It would not be the amount that was paid to the company for the bond that would be the determining factor. One who had bought his bond for 50 cents on the dollar would have equal voting power with one who had paid 100 cents.

The language of sec. 15 of 36 Vict. ch. 73 (O.) is sufficient, in my opinion, to give a bondholder more than one vote if he has more than one bond, but I do not find in it sufficient warrant to give him more votes than there are bonds held by him. If the legislature meant to give him more I think it should have said so in unmistakable terms.

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[MEREDITH, J.]

May 27.

PLANT V. THE CORPORATION OF THE TOWNSHIP OF
NORMANBY, ET AL.

*Municipal Corporations—Elevated Highway—Repair—Guard-rails—Accident—
Defective Harness—Negligence of Driver—Want of Knowledge of Plaintiff.*

The female plaintiff was being driven by her mother over a highway at a point where a hill had been partly cut down and the valley filled up making a good level road from 7 to 10 feet above the natural level of the ground. The horses and conveyance belonged to the mother and the neck-yoke and harness were defective to her knowledge, but there was no evidence that the daughter was aware of that fact. The neck-yoke broke, the control of the horses was lost and the conveyance went over the bank and the daughter was injured :—

Held, that it was the defendant's duty to keep the highways in such a condition of repair as the reasonable demands of the traffic over them from time to time required having regard to their means of performing such duty ; that the failure of the defendants to place guard-rails or a protection along the embankment was a breach of that duty, and that their fault was the proximate cause of the female plaintiff's injury.

The driver was driving carelessly and the defective harness and her carelessness largely contributed to the accident :—

Held, that although her contributory negligence would have been an answer to any claim by herself it could not be said that it was the proximate cause of the daughter's injury.

Held, also, that the mother's negligence should not be attributed to the daughter who was ignorant of the state of the harness, etc., and in the absence of such knowledge the defence of her contributory negligence failed.

THIS was an action by a husband and wife against the corporation of the township of Normanby and the corporation of the township of Minto, for damages sustained by the wife in being thrown over the side of an elevated highway from a conveyance, of which the driver had lost control from the breaking of the neck-yoke of the horses, there being no guard-rails or protection at the sides of the highway.

The action was tried at Guelph on the 3rd and 4th of April, 1905, before MEREDITH, J., without a jury.

W. Kingston, K.C., for the plaintiffs.

J. P. Mabee, K.C., for the defendants.

May 27. MEREDITH, J. :—This case is, in some respects, of more than usual importance. It calls for a more definite decision, as to the duty of municipalities to maintain guard-

rails along raised highways, than heretofore has been given. The question can, now that actions such as this must be tried without a jury, no longer be avoided by placing the responsibility for the answer upon a jury; leaving the parties to content themselves, as much as they can, with the jury's unexplained—and perhaps sometimes unexplainable—conclusions. The findings of one Court upon a question of fact may not be binding upon any other Court; but Courts, which, like all reasonable mortals, should abhor inconsistent verdicts, are not likely to give inconsistent judgments even upon questions of fact.

The defendants, in improving upon the natural condition of the highway in question, cut down to some extent a hill and filled in to some extent the valley at its foot—all within the limits of the highway. The filling in has resulted in an excellent but narrow road-bed, seven to ten feet above the natural level of the ground at the place in question, with sloping banks on each side, having a fall of about one foot in two. The road at this point is said by the plaintiff's witnesses to be but eleven feet in width, but the defendants' witnesses say that the width is seventeen feet. Little turns upon the difference. In either case there would be some danger in passing over the road, and danger of such a character that the difference in width would not be a very important factor. In neither case would there be danger under ordinary circumstances; the danger would arise only in mischance, such as horses running away, shying or plunging, and in other ways which readily suggest themselves, and in the dark.

No accident attributable merely to the height or narrowness of the road seems ever to have happened at or near to the place in question. The upsetting of the load of hay might have happened, under the same circumstances, upon any road. The want of a guard-rail has no doubt been felt, especially by timid, and sometimes no doubt by cautious, drivers; but its absence was of greater importance, and more, if not altogether, felt, to and by those driving in the direction opposite to that in which the female plaintiff was being driven, by reason of the impetus given to their horses and vehicles in going down the hill before reaching the place in question; going as, and where, the plaintiff was, no difficulty of that character could arise; the road was

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nearly level until the place of the accident was passed. Such immunity from accident seems to give road drivers and horses a good character; but it is obvious that some danger lurks in the place in question which could be removed by means of guard-rails. Any difficulty in teams passing one another at the place in question has little if any bearing upon the plaintiff's claim; there were no other vehicles upon the road at the time of the accident.

Then what was the defendants' duty in respect of this highway; and has there been any breach of such duty? Their duty is prescribed in the words: "Every public road, street, bridge and highway shall be kept in repair by the corporation." That does not mean that they shall restore some existing thing to the state in which it was before falling into disrepair, but does mean that they shall keep such highways in such a condition as the reasonable demands of the traffic over them shall from time to time require, having regard to the corporation's means of performing such duty—an efficient state of repair having regard to all the surrounding material circumstances. The cases so decide: the peculiar circumstances of a comparatively new country, situated as this Province is in regard to its highways, make it necessary. And I am now obliged to say whether the failure of the defendants to place a guard-rail, or other sufficient protection, along the embankment which has been described was a breach of that duty: in my opinion it was. The corporation had very ready means of supplying the protection, a guard-rail on each side would have made the road quite safe from all such accidents as that which befell the female plaintiff. Two long settled and wealthy—for a Province such as this—townships, equally concerned and whose whole taxation amounts to really a little less than half a cent in the dollar of the actual value of their assessable property, can hardly be excused on the score of poverty. The cost would be but a small sum so far as the place in question is concerned, and there was no evidence of any like place in either township needing protection. Elevations of two, three or four feet stand upon an entirely different footing; in such cases there is obviously not the danger there was in the place in question; generally in case of necessity the horses can at such

heights, with properly sloping banks, be turned into the ditch without injury in any way: that was impossible at the place in question.

The defendants were therefore at fault, and that fault was the proximate cause of the female plaintiff's injury; the next question is whether she was also at fault, whether she was guilty of negligence without which her injury would not have been sustained. That her mother—the driver of the conveyance—was negligent there can be no doubt; it was a want of ordinary care to drive any women and children, and more so her daughter then big with child, knowing that the harness was old and defective and without a neck-yoke, with only a clumsy "make-shift" for one, in the form of a farming implement neck-yoke attached to the pole of the conveyance by a clumsy chain; and again no reasonable doubt that immediately before the accident she was driving carelessly and near to the side of the road over which the conveyance went, and without an eye upon the road and her horses such as every driver should have, and especially so in a place of some danger, and with unsafe harness. That which ought to have been anticipated and guarded against happened, the pole became detached from the "make-shift" neck-yoke. Control of horses, in consequence, was lost, and the accident happened. To defective harness and the driver's want of care, the accident was, in a large measure, attributable; without them it would not have happened. If the driver were suing, her claim would, upon the evidence adduced in this case, fail, on the grounds of contributory negligence. But it cannot be said that the driver's negligence was the proximate cause of the female plaintiff's injury. Notwithstanding that negligence the accident which did happen and the injury which she sustained could not have happened and been sustained if the defendants had performed their duty by guarding the road with ordinary guard-rails. That some other accident more or less serious might have happened—if it might—can make no difference; the want of suitable protection at the roadside was the cause of the female plaintiff's injury.

The mother's negligence is not to be attributed to the daughter. The mother was not the daughter's servant or

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agent; it was a case of hostess and guest. So that the question is not, was the mother, but is, was the daughter guilty of contributory negligence? The daughter is not bound by her mother's negligence, but is answerable for her own, and if, by the exercise of ordinary care, she might have avoided her injury, the plaintiffs cannot recover.

The case is not one of a public conveyance, which a passenger might not have skill, right, time, or opportunity to inspect, and which might be presumed by passengers to be road-worthy. The passenger in this case was the daughter of the owner of the conveyance and also of the driver of it; and though she was married and for some length-of time had lived away from their home, she had yet some of the privileges of a daughter at home, and some of the knowledge acquired while living at home before her marriage. But she was, as I have said, a woman then heavy with child. Assuming it to have been her duty, as I think it was, to have had some care in regard to the conveyance and driver, it cannot be said that it was her duty to have made such an inspection of the horses harness and conveyance that she must have observed the insecure neck-yoke, and ought then to have refused to go unless a proper one were provided; but it would, in my opinion, having regard to the woman's knowledge of and experience in driving, and to her knowledge of the roads over which they were to pass, and to her physical condition, have been negligent in her to have gone had she known of the absence of the neck-yoke and the character of the substitute for it. There is no evidence that she had any such knowledge, and therefore the defence of contributory negligence fails, and the plaintiffs are entitled to recover.

The question of damages, difficult with the best of evidence, is in this case doubly difficult because the evidence upon that question may not unfairly be characterised as almost the worst of evidence—in the sense of want of evidence. But one professional gentleman has given an opinion upon oath on a somewhat obscure injury, and that one her surgical and medical attendant at and since the time of the injury. A paucity of evidence in regard to a hidden injury and its effect; and that evidence not given in Court, but upon a commission, so that the

Court is deprived of the benefit which might be obtained from a few pertinent questions which have not yet been answered or asked. But the parties have chosen to leave it so, and so the case must be dealt with and their rights determined, however unsatisfactory it may be.

My conclusions from the evidence, such as it is, are that whatever other injuries the female plaintiff sustained—if any—she sustained a dislocation of the hip joint, and that that from which she now suffers is a failure to reduce that dislocation, and that she must always be crippled to some extent in consequence. That the chances of relief from another attempt to put the leg in joint are too meagre to have much if any effect on the question of damages. That in time the accommodation which nature brings to abnormal conditions will gradually ameliorate present conditions, but that the woman must always remain with one hip out of joint, and most of us have observed what that means after every natural assistance has been afforded. The woman is young, strong, and healthy, and so likely to receive all the accommodation and compensation which nature can give. Even assuming that there was not the complication of fractures which the surgeon diagnosed, it is not, in all the circumstances of the case, very extraordinary that the dislocation should not have been reduced; and in any case there was no contributory negligence on the part of either plaintiff in the failure to reduce it, if it was not reduced.

The female plaintiff claims \$1,000 damages, and that claim is not, in my opinion, excessive; there will be judgment in her favour and \$1,000 damages.

The male plaintiff—her husband—claims a like sum: this claim is, in my opinion, excessive. His testimony as to the money value which his wife had been to him was, I thought and think, exaggerated; if indeed his wife saved him the costs of harvesters and of a mail carrier by performing such services herself, perhaps her accident is not an absolutely unmixed evil, perhaps the ill wind has blown some particle of good. But he has lost by the unfortunate accident and is entitled to reasonable compensation. That compensation is assessed at \$500. There will be judgment in his favour and \$500 damages.

The defendants must pay the costs of the action.

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[IN CHAMBERS.]

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IN RE IMPERIAL STARCH COMPANY.

April 11.

Company—Transfer of Shares—Fully Paid up Shares—Refusal to Transfer—R.S.O. 1897, ch. 191, sec. 47.

Section 47 of the Ontario Companies Act, R.S.O. 1897, c. 191, empowers directors to make by-laws to regulate the transfer of stock, that is to declare how and in what manner and with what formalities it is to be transferred, but the Act nowhere authorizes a company to refuse to transfer on their books fully paid up shares.

THIS was a motion to compel the registration of the transfer of two shares of stock of the above company in the books of the company under the circumstances mentioned in the judgment.

The motion was argued before MACMAHON, J., in Chambers on April 7th, 1905.

W. H. Blake, K.C., for the applicant, contended that although under sec. 47 of the Companies Act, R.S.O. 1897, ch. 191, directors can regulate the transfer of stock, they cannot forbid it; and cited *In re Panton & Cramp Steel Co.* (1904), 9 O.L.R. 3; and *In re McKain and Canadian Birkbeck I. & S. Co.* (1904), 7 O.L.R. 241; and *In re Smith v. Canada Car Co.* (1873), 6 P.R. 107.

W. J. Boland, for the company, relied on sec. 47 of the Companies Act, and referred to *Upton v. Hutchison* (1899), 2 Q.P.R. 300; *In re Coalport China Co.*, [1895] 2 Ch. 404; *In re Gresham Life Assurance Society, Ex parte Penney* (1872), L.R. 8 Ch. 446; *Burland v. Earle*, [1902] A.C. 83.

April 11. MACMAHON, J.:—Motion on behalf of George F. Benson for a mandamus to compel the Trusts and Guarantee Company, Limited, as transfer agent and registrar of the Imperial Starch Company, Limited, to rectify the register of the Starch Company, and to enter and record the transfer of two shares of the preference stock of the Starch Company from William M. Leacy to the applicant.

The Imperial Starch Company on November 1st, 1901, issued to William M. Leacy a certificate for five fully paid up shares of the preference stock of that company of the par value of \$100 each, which, as appears by the certificate "are transfer-

able only on the books of the company by the owner thereof in person or by attorney on the surrender of this certificate." On the face of the certificate the Trusts and Guarantee Company is named as the transfer agent and registrar of the company.

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Leacy, on January 16th, 1905, assigned by endorsement on the back of the certificate, two of the shares to J. F. Junkin, of Toronto, which were transferred to him by the Trusts and Guarantee Company, the transfer agents of the Starch Company, on the books of that company, on January 28th, 1905. Mr. Junkin then desired to transfer one of the shares to George F. Benson, and the other to Mr. Strachan, of Montreal. Upon the manager of the Trust Company being informed that Mr. Benson was the managing director of the Edwardsburg Starch Company, Mr. Junkin was told that the Trusts Company as transfer agents could only transfer stock of the Starch Company upon the authority of that company being given. Shortly after this, Mr. Hugh Blain, President of the Imperial Starch Company, telephoned the Trusts Company that the transfers of the shares to Mr. Benson and Mr. Strachan were not to be put through. Mr. Junkin attended again on January 24th, and requested the transfers to be made to Mr. Benson and Mr. Strachan, but the Trusts Company refused his request.

On February 8th or 9th, Mr. Junkin requested the Trusts Company to have the transfer of the shares to himself cancelled, as he wished to return the certificate to Mr. Leacy, and the cancellation was made on the books of the Imperial Starch Company, and the transfer to Mr. Junkin on the back of the certificate was stamped "cancelled," and the certificate returned by Junkin to Leacy.

Leacy by endorsement on the share certificate dated February 27th, assigned two of the shares to George F. Benson, and Leacy appointed Mr. W. H. Blake, his attorney, to transfer the shares on the books of the Imperial Starch Company to Mr. Benson. Mr. Blake was also appointed attorney by Mr. Benson to accept for him the said two shares of stock. Mr. Blake, on March 2nd, exhibited the share certificate, the transfer and the powers of attorney to the manager of the Trusts and Guarantee Company, and applied to have the stock transferred, but the manager refused to make the transfer.

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On January 26th, 1905, at a meeting of the directors of the Imperial Starch Company, the following by-law was passed:—

“Whereas it is desirable and in the best interests of the company that the shares of the company shall be transferable on the books of the company only in such manner and subject to such conditions and restrictions as are hereinafter mentioned. Now, therefore, be it enacted, and it is hereby enacted, that no transfer of any stock or shares of the company shall be valid until approved of by the directors, and registered on the books of the company. All transfers of stock or shares shall be at the discretion of the directors.”

Before this by-law could become effective, it required ratification by the stockholders, and at a meeting of the stockholders held on February 7th, representing 1,700 out of a total of 2,000 shares, the by-law was unanimously ratified.

The Imperial Starch Company was incorporated under the Joint Stock Companies Act, R.S.O. ch. 191, and by sec. 27 it is provided: “The shares of stock of the company shall be deemed personal estate, and shall be transferable on the books of the company in such manner only, and subject to all such conditions and restrictions as by this Act, or by the special Act, or by the letters patent or by-laws of the company may be prescribed.”

“28. The directors may refuse to allow the entry, in any such book, of any transfer of shares of stock whereof the whole amount has not been paid in.”

“30. No share shall be transferable until all previous calls thereon have been fully paid in, or until declared forfeited for non-payment of calls thereon.”

And by sec. 47, “the directors may from time to time make by-laws not contrary to law, or to the letters patent of the company, or to this Act, to regulate:—

(a) The allotment of stock; the making of calls thereon; the payment thereof; the issue and registration of certificates of stock; . . . the transfer of stock.”

One need not stop to consider such cases as *Bradford Banking Company v. Briggs, Son & Co. Ltd.* (1886), 12 App. Cas. 29; *Bank of Africa v. Salisbury Gold Mining Company* (1892), 41 W.R. 47, and *In re McKain and Canadian Birkbeck I. & S. Co.*

7 O.L.R. 241, where, in the first two cases, the question for decision was: Whether a lien conferred by articles of association on the shares of a member indebted to the company was valid, any transfer by such indebted member being made dependent on the consent of the directors. And in the McKain case a question of a somewhat similar character arose under a by-law passed by the Birkbeck Company. No such question arises here, as the five shares owned by Leacy (two of which he transferred to Benson) are fully paid up shares.

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The point raised here is concluded by the decision in *Re Pantton and Cramp Steel Co.*, 9 O.L.R. 3. Osler, J.A., in delivering the judgment said, "The transfer being in order and the stock paid in in full, the company had no discretion to exercise in the matter, or option, but to comply with the demand of the transferee to record the transfer."

The statute gives the company power to pass by-laws "regulating the transfer" of stock; that is: How and in what manner and with what formalities it is to be transferred. But the Imperial Starch Company has passed a by-law virtually empowering the directors to prohibit the transfer of stock; that is, unless the directors approve of the transfer it cannot be made in the books of the company. This, in effect, would prevent a holder of fully paid up shares in the company from selling and realizing on his stock, because no purchaser could be found, if registration as owner could be prevented at the caprice of the directorate.

Under sec. 28 of the Act the directors may refuse to allow the entry to be made of any transfer of shares of stock in any such book whereof the whole amount has not been paid in. This section was enacted to prevent a solvent shareholder from escaping liability for unpaid calls by transferring his stock to a man of straw; and the power of the directors does not extend beyond refusing to transfer stock which has not been fully paid in.

The order must go for the transfer of the two shares to the applicant Benson on the books of the Imperial Starch Company. That company must pay the costs of the applicant and of the Trusts and Guarantee Company.

A.H.F.L.

[IN THE COURT OF APPEAL.]

C. A.

THE KING v. THE TORONTO RAILWAY COMPANY.

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April 12.

Criminal Law—Criminal Code, secs. 191, 192—Common Nuisance, Indictment for—Negligent Operation of Street Cars—Running Reversely—Absence of Fenders and Headlights—Accident.

An indictment alleged that defendants, a street railway company, were authorized to operate a street railway on certain streets in a city, and, in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, which, it was averred the said company, without reasonable excuse, neglected to do, whereby the lives and safety of the public were endangered and a common nuisance thereby committed. In support of the indictment, it was shewn that near the northerly end of a double tracked street, and, at the intersection with a street at right angles thereto, there was what was called a "Y," whereby cars were turned on to the intersecting street and then switched on to a single track, which was usually the down track of the line of railway, the cars being backed up for about a half a mile, the rear part of the car thus for the time being the front thereof. While being so backed up, a woman in attempting to cross the street and not seeing or knowing of the approach of the car, it being dark at the time, was knocked down and killed. There was no fender or headlight on this end of the car, although provided on the usual front thereof, nor was any gong sounded or signal given of the car's approach:—

Held, that the indictment sufficiently charged a common nuisance both at common law and under secs. 191 and 192 of the Criminal Code; and that a conviction of the defendants was properly sustainable on the evidence.

THIS was a case reserved by the chairman of the general session of the peace for the county of York on an indictment under which the defendants were convicted.

The indictment was as follows:—

"The jurors for our Lord the King present that the Toronto Railway Company, a corporation incorporated by an Act of the Province of Ontario, passed in the session held in the 55th year of the reign of Her late Majesty Queen Victoria, and chaptered ninety-nine, for a number of months past and during the year of our Lord, one thousand nine hundred and four, down to the date of the finding of this indictment, has been operating an electric railway upon certain public streets and highways, to wit, those streets or highways known as Avenue road and Dupont street, in the city of Toronto, in the county of York, and has been operating and running cars thereon by the force and motive power of electricity, for the purpose of carrying passengers upon that portion of the said streets or

highways on which their tracks are laid, and upon other streets and highways in the said city of Toronto on which tracks of the said company were laid; and that the said corporation had and has in its charge and under its control, and did make and maintain a large number of cars used for the purpose of operating the said railway, and operated by the motive power of electricity, for the purpose of carrying passengers upon the said streets and highways; and that the said corporation was bound and ought to use only cars of the most approved design for service and comfort, and equipped with all proper and sufficient fenders, guards and appliances, lights and signals, to avoid danger to human life; and that, in the absence of reasonable precaution and care, the said cars so operated and run by the motive power of electricity by the said corporation as aforesaid upon the said Dupont street and Avenue road and upon other streets and highways in the said city of Toronto, might endanger human life; and that the said corporation were under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger to human life in operating their said cars as aforesaid; and that the said corporation, the Toronto Railway Company, at the said city of Toronto, during the time hereinbefore set out, without lawful excuse, unlawfully neglected and unlawfully omitted to take reasonable precautions and use reasonable care to avoid danger to human life in the operation of their said cars upon the said Dupont street and Avenue road, and upon other streets and highways in the said city of Toronto, to wit, by having in its charge and under its control, and by maintaining and operating cars that were not of the most approved design for service and comfort, and by neglecting and omitting to provide proper or approved fenders, guards or appliances, lights and signals, to avoid danger to human life, to be attached to the cars, including car number 697, so operated by the said corporation; and by improperly, illegally and negligently operating and running the said cars, including car number 697, in consequence whereof the lives, safety and health of the public, as well foot passengers as also other subjects of our Lord the King, during the time aforesaid using the portion of the said Dupont street and Avenue road on which the tracks of the said company are

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laid, and on certain other streets and highways in the said city of Toronto, were endangered, and in consequence whereof the said corporation did thereby, at the city of Toronto aforesaid, in manner aforesaid, on or about the thirtieth day of June, in the year of our Lord one thousand nine hundred and four, cause grievous bodily injuries to one Elizabeth Ward, resulting in the death of the said Elizabeth Ward; and that the said corporation, the Toronto Railway Company, at the city of Toronto, during the time hereinbefore set out, in manner aforesaid, unlawfully did commit a common nuisance, thereby then endangering the lives, safety, health, property and comfort of the public, as well foot passengers as also other subjects of our said Lord the King, against the form of the statute in that case made and provided.

“And the jurors aforesaid do further present, that the said corporation, the Toronto Railway Company, at the said city of Toronto, during the time and in the manner in the preceding count of this indictment set out, unlawfully did commit a common nuisance, thereby then occasioning injury to the person of a certain individual, to wit, to the person of one Elizabeth Ward, against the form of the statute in that case made and provided.

And the jurors aforesaid do further present that the said corporation, the Toronto Railway Company, at the said city of Toronto, during the time and in the manner in the first count of this indictment set out, did unlawfully and negligently omit to supply the cars operated by them, as in the said preceding count set out, with proper fenders, guards and appliances and with proper lights and signals to avoid danger to human life, and did run and operate the same without reasonable precaution and care, causing thereby grievous bodily injury to the said Elizabeth Ward against the form of the statute in that case made and provided.

And the jurors aforesaid do further present that the said corporation, the Toronto Railway Company, at the said city of Toronto, during the time hereinbefore set out, unlawfully and injuriously did have in its charge and under its control, and did make and maintain and operate, and did cause, permit and suffer to be maintained and operated by the motive power of

electricity upon the railway of the said corporation upon the said portion of Dupont street and Avenue road upon which the tracks of the said company are laid and upon other streets and highways in the said city of Toronto, a number of cars, including car No. 697, without taking reasonable precautions or using reasonable care to avoid danger to human life in the maintenance and operation of their said cars, as hereinbefore set out, upon the said Dupont street and Avenue road and other streets and highways in the said city of Toronto, and without providing proper and sufficient fenders, guards and appliances, lights and signals to avoid danger to human life for the said cars, including car No. 697, so operated by the said corporation, by reason and means whereof the lives and safety of the subjects of our Lord the King, during the time hereinbefore set out, using the said portion of Dupont street and Avenue road and other streets and highways in the said city of Toronto, were imperilled and endangered; and the said subjects of our Lord the King, during the time aforesaid, could not go, return, pass, repass, ride and labour on foot, with their horses, coaches, carriages, carts or vehicles in, through and along the said common highways known as the said portions of Dupont street and Avenue road, and in, through and along other highways in the said city of Toronto upon which the said corporation as aforesaid operated its said railway, and maintained and ran its said cars, as they ought and were wont and accustomed to do, to the great danger and common nuisance of all His Majesty's subjects going, returning, passing, repassing, riding and labouring in, through and along the said common highway known as the said portion of the said Dupont street and Avenue road, and in, through and along the other streets and highways in the said city of Toronto upon which the said corporation so ran its said cars, to the evil example of all others, and against the peace of our Lord the King his Crown and Dignity."

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The indictment came on for trial at the general sessions and a jury on 30th September, 1904.

Before pleading thereto the defendants moved to quash the same, but the motion was dismissed by the county Judge.

At the trial the evidence shewed that at the junction of

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Avenue Road and Dupont Street there is what is called a "Y." By means thereof the cars were turned on to Dupont Street, and then switched on to what would be the continuation of the west or down track of the Avenue Road line, so that the rear of the cars for the time being became the front, and they were so backed up to the city limits, the distance of about a quarter of a mile.

On the evening of the 30th June, about half past nine o'clock, the car in question on arriving at Dupont Street was by means of the "Y" switched on to Avenue Road, and was backing up along Avenue Road, proceeding at the speed of about four miles an hour, when, as it approached Macpherson Avenue, which was about a couple of hundred yards from Dupont Street, Mrs. Ward, not seeing, or knowing of its approach, in attempting to cross the street, was knocked down by the car and killed. There was no fender on this part of the car, nor any head-light nor was any gong sounded, or warning given, while the motor-man was at the other end of the car, though the conductor was at the rear end.

The defendants were convicted of the offence charged; but, at the request of their counsel, a case was reserved, and the following questions submitted for the opinion of the Court of Appeal:—

1. Does the indictment sufficiently charge the defendants with the indictable offences therein mentioned under statute or common law?
2. Was there sufficient evidence to justify the conviction?
3. Did the learned county Judge improperly admit evidence as to the system of operating the cars?
4. Was the charge of the county judge to the jury improper in any material respect?

On January 30, 1905, the case was heard before Moss, C.J.O., OSLER, MACLENNAN, and GARROW, J.J.A.

James Bicknell, K.C., and *J. W. Bain*, for the defendants:—No indictable offence under secs. 191, 192, and 213* of the

*191.—A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property

Code is shewn. The defendants are expressly authorized to use the streets, and there is nothing to shew any defect in the construction of their cars or of their tracks. To constitute a nuisance under these sections there must be something dangerous in the thing itself, for instance here, the car, and not in the mode of using it. No case can be found where the manner of driving a carriage has been held to be a nuisance. Neglect in operation is provided for in other sections of the Code and is a different offence. Moreover the defendants being a corporation are not liable, for it is impossible for a corporation as such to operate a car: Russell on Crimes, 6th ed. vol. 1, p. 732; *Peachy v. Rowland* (1853), 13 C.B. 182; *Ellis v. Sheffield Gas Consumers' Co.* (1853), 2 E. & B. 767. The defendants complied with the requirements of the statute in having a head-light and fender on the front of the car, and there was also a motorman in charge of the motor, and a conductor at the rear end. The fender here was in accordance with the requirements of the Act 1 Edw. VII. ch. 25, sec. 1 (O.), amending sub-sec. 4 of sec. 18 of the Street R.W. Act, R.S.O. 1897, ch. 208, sec. 18. In any event the statute prescribes a penalty for an omission in this respect, and therefore the company are relieved from any further liability. The accident did not arise through any want of care on the part of the defendants, but by reason of Mrs. Ward's own reckless act in attempting to cross in front of a moving car. Had it been a civil action, the Judge, undoubtedly, would have withdrawn the case from the jury. No duty is imposed on the defendants to protect persons against the result of their own negligence.

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or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

192.—Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine, who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual.

213.—Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

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J. R. Cartwright, K.C., and H. L. Drayton, for the Crown :—

There is no question but that the defendants were guilty of a nuisance. The fact that the defendants have the right to use the streets does not under the sections of the Code justify them in using the streets in such a manner as to render them guilty of an offence either by the commission of an unlawful act or by the omission to discharge a legal duty, whereby life is endangered. They can only use the streets with regard to the safety of others. To do otherwise renders them guilty of a nuisance. No precautions were taken here. There was no head-light or fender on the part of the car, which to all intents and purposes was then the front of the car, nor any gong sounded, or signal given of its approach. It is no answer to say that there was a fender or head-light on what was usually the front of the car. The moment they began to back up along Avenue Road, what had been the rear part of the car, became the front, and the public were entitled to the same safeguards as are necessary when the actual front of the car is used. Reckless driving within the cases constitutes a nuisance. The principal is guilty of a nuisance caused by the act of his agent or servant and this applies when a corporation is principal : Roscoe's Crim. Ev., 12th ed., p. 706 : *Rex v. Medley* (1834), 6 C. & P. 292, *Regina v. Stephens* (1866), L.R. 1 Q.B. 702. In *Union Colliery Co. v. The Queen* (1900), 31 S.C.R. 81, 4 Can. Crim. Cas. 400, where the defendants had omitted to keep a bridge in proper repair, the principle was discussed as to what constitutes a nuisance, and whether a corporation can be held liable therefor, and the Court was clearly of the opinion that a nuisance was committed and that the corporation were liable. In the *Queen v. The Toronto R.W. Co.* (1900), 4 Can. Crim. Cas. p. 4, the form of the indictment in such a case was considered by the late Judge McDougall. The first count is exactly similar to the present one and the learned county Judge held that a nuisance was properly chargeable. It is not essential that the nuisance should exist in some defect in the car itself. There must be a proper use of the street, otherwise a nuisance is created : Russell on Crimes, 6th ed., vol. 1, p. 786.

April 12. The judgment of the Court was delivered by OSLER, J.A.:—The indictment on which these defendants were convicted seems to have been framed upon the precedent of one in a former case against them before the late learned Judge of the county court of the county of York, Macdougall, Co. J., which was then held to be sufficient as an indictment for a common nuisance under secs. 191, 213 of the Criminal Code. The charge there was that the company operated cars constructed in such a manner as to be likely to endanger the lives and safety of persons using the highway in common with the railway, that is to say, without proper fenders: *The Queen v. Toronto R.W. Co.*, 4 Can. Cr. Cas. p. 4.

The form is needlessly prolix, but I am of opinion that the first and fourth counts, at all events, of the indictment now in question sufficiently charge a common nuisance either at common law or under secs. 191 and the first part of sec. 192 of the Code.

These counts in substance allege that the defendants were authorized to operate a street railway on certain streets in the city of Toronto and in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, but without reasonable excuse neglected to take such precaution, and did thereby endanger the lives and safety of the public, and thereby committed a common nuisance.

The causing of the death of Elizabeth Ward is stated merely as an illustration of the way in which the nuisance alleged affected the individual mentioned as one of the public, the consequence, in short, of the offence.

The nuisance, the commission of which the defendants are charged with, is the omission to discharge a legal duty, which omission endangered the life, health or safety of the public, a sufficient statement of what constitutes a common or public nuisance either at common law or under the Code, sec. 191. The duty alleged is that which exists as well at common law as under sec. 213 of the Code: every one who has in his possession or under his control anything whatever, animate or inanimate, or who maintains anything whatever which in the absence of precaution or care may endanger human life, is under a legal duty to take reasonable precaution against, and to use reasonable

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care to avoid, such danger, and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty. And sec. 192 of the Code (1st branch) enacts that everyone is guilty of an indictable offence and liable to one year's imprisonment or a fine—(as to corporations see sec. 639)—who commits any common nuisance which endangers the lives, safety or health of the public.

In *Union Colliery Co. v. The Queen*, 31 S.C.R. 81, 4 Can. Cr. Cas. 400, the appellants were the owners of a public franchise to operate a railway between certain points. In its course the railway crossed a bridge which they were bound, but neglected, to maintain in a safe and secure condition for the traffic which they carried over it. In consequence of their neglect a train broke through the bridge and several persons in it were killed. It was held that the appellants were indictable under secs. 213, 191, 192, as for a common nuisance, and a conviction therefor was maintained.

The question chiefly discussed, namely, whether a corporation could "render itself amenable to the criminal law for acts which are invasions of the rights or privileges of the public at large or detrimental to the general well-being or interests of the state," had been already settled by *Regina v. Great North of England R.W. Co.* (1846), 9 Q.B. 315, and other cases; but it was also determined, citing for the rule of construction *Pharmaceutical Society v. London and Provincial Supply Association* (1880), 5 App. Cas. 857, that the words "every one" in sec. 213 of the Code would include a corporation, and that even if no punishment was provided for the infraction of that section (though it seems to be by sec. 192 if the offence is within secs. 191 and 213) the common law punishment of a fine might be imposed upon the corporation.

I agree with what the learned county Judge is reported to have said in the case above cited that "the public can only look for protection to the general law applicable to those using the highway: such law would apply to a street railway company operating cars constructed in such a manner as to be likely to endanger the lives and safety of persons using the highway in common with the railway. The defendants have acquired no rights for their cars on the highway in common

with the railway," and again, "I am of opinion that the defendants are under a legal duty to operate their cars upon the highway so as to avoid endangering the lives of the public using the highways in common with themselves. What form these precautions ought to take must be largely a matter of evidence."

In the case at bar the evidence was that on lines of the defendants on streets like Avenue Road, running north and south, with double tracks thereon, the cars going north ran on the eastern track and those going south on the western track. That this was the general practice and one to which the public were used and accustomed: that on arriving at Dupont Street, a street running westerly from Avenue Road, in order to turn the car for the purpose of its return trip south, it would cross into that street for a short distance and then go backwards into Avenue Road, the tracks over which it thus passed on re-entering that road forming what is called a "Y." Instead, however, of passing over to the track on the east side of Avenue Road and continuing its northerly journey thereon to the end of the line, and then switching over to the west side on arriving there to begin its southward journey, it proceeded backwards for rather more than a quarter of a mile to the end of the line on the western track, which having reached, it started again in the opposite direction. The car was thus, while going northward from Dupont Street, not only reversed but was going northward on a track on which the cars usually go when travelling southward, and there was neither fender nor headlight on what had thus temporarily become the front end of the car, and the motorman and gong were not at that end nor was it usual to sound the gong while going the short distance from Dupont Street to the end of the line. There was evidence that all this was likely to be very confusing to persons crossing the street, and that at night it was not easy, in the absence of headlight or gong, to say whether a car proceeding reversely was coming towards one, or going in the opposite direction, and that the system on which the defendants managed their cars at this place—for it was not a matter of occasional breach of duty or negligence on the part of the servants of the company in charge of the car—was a source of danger to the public and was probably the cause

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of the death of the person mentioned in the indictment. There was, no doubt, evidence both ways, but there was evidence on which the jury were justified in finding against the defendants.

Mr. Bicknell urged that the absence of the fender at the rear end of the car could not be considered as evidence of neglect or want of care in the management of the car, or as an element of the criminal negligence the defendants are charged with, because the statute, 1 Edw. VII. ch. 25, sec. 1 (O.), only requires them to have a fender on the front end of the car; that their cars were so furnished, and that in any case the statute affixes a penalty to default which exonerates them from further responsibility.

The answer, however, to this objection is that the statute is not dealing with the question of criminal negligence: that it indicates what it is reasonable the defendants should do for the safety of the public in this respect: that the per diem payments which the defendants are charged with for neglect are not imposed *qua* penalty, but are merely constituted a debt to the local municipality; and that if the defendants had complied, as they say, with the statute by placing fenders on the front ends of the cars, they were *a fortiori* operating them in a negligent and dangerous manner by doing so in a way which made the fenders ludicrously useless.

I do not think there is any substantial objection to the Judge's charge, or that evidence was improperly admitted.

The questions submitted must therefore be answered in favour of the Crown.

G. F. H.

[BRITTON, J.]

PLOUFFE V. THE CANADA IRON FURNACE COMPANY, LIMITED.

1905

May 13.

*Negligence—Accident—Cause of—Failure to Disclose—Contributory Negligence—
Hole in Ice—Navigable Waters.*

The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of their dock, being a place accessible to, but not frequented by, the public. The tug accidentally filled with water and sank, breaking the ice, and leaving open water above the deck, over which fresh ice formed. This was cut away by the defendants with the object of raising the tug, and, while in this condition, the body of the plaintiff's husband was found lying on his back with his feet and legs on the surrounding ice and the head in the water. It appeared that on the evening before the finding of the body the deceased was in a state of intoxication. To a question put to the jury, whether deceased by means of ordinary care, could have avoided the accident; and how he could have so avoided it, they answered, "Yes, he might have taken another road; or, if sober, on a bright night, he might have avoided the hole;"—

Held, that no negligence on the part of the defendants was established, for it was quite as reasonable to conclude that deceased voluntarily sat down on the edge of the hole and perished from exposure, as that he walked into the hole.

Held also, that the answer of the jury to the question put to them was not one in favour of contributory negligence.

THIS was an action tried before BRITTON, J., and a jury, at Barrie, on February 21st, 1905.

It was brought by the plaintiff as widow of, and on behalf of the children of, Urgel Plouffe, for damages sustained by him through the alleged negligence of the defendants.

The facts appear in the judgment.

A. E. H. Creswicke, for the plaintiff.

E. E. A. DuVernet and *W. Finlayson*, for the defendants.

May 13th. BRITTON, J.:—The alleged negligence herein was occasioned by the defendants not guarding a hole which they had made through the ice in Midland harbour, under the following circumstances.

The defendants are the owners of a large dock at Midland, lying alongside of which and wintering there was their tug "Voyageur." This tug accidentally filled with water and sank at the dock, breaking the ice and leaving open water above her deck. The tug was not immediately raised, and ice formed over the sunken boat. In a short time, and at the defendants'

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convenience, they cut the new ice recently formed and proceeded with the work of raising the steamer. The defendants did not place any brush, or obstruction or sign, or in any way mark the place of open water, or give any warning of danger.

On the morning of the 7th February, 1903, the body of the deceased was found near this tug. He was lying upon his back; his feet and legs were upon solid ice; his head in open water.

Some witnesses stated that the nose and mouth were not under water, or covered by water. Other witnesses said the nose and mouth had been covered with water, and there was a thin coating of ice over the mouth, which was broken off upon the body being moved. The deceased came to his death by drowning or exposure. There was no post-mortem examination of the body.

On the evening before the morning when the body was found, the deceased was at Midland; he had been drinking that day, and, upon the undisputed evidence, there is no doubt that he was that evening in a state of intoxication. He went to Midland from Penetanguishene in company with his brother-in-law, Peter Le Rush. They were drinking more or less together at Midland. Le Rush left deceased at Midland, about 10 o'clock on the evening of the 6th, and that is the last that was seen of deceased when alive.

At the close of the plaintiff's case, and again after all the evidence was in, the defendants asked for a non-suit.

I reserved decision upon this motion, and submitted certain questions to the jury, all of which were answered by the jury in favour of the plaintiff, except the 5th question, which was—

“Could the deceased by the exercise of ordinary and reasonable care have avoided the accident which occasioned his death; and, if so, in what respect or how could the deceased have avoided the accident?”

The latter part of the question was added at the request of counsel for the plaintiff.

To this question the answer was—“Yes, he might have taken another road, or if sober, on a bright night, he might have avoided the hole.”

The jury assessed the damages at \$1,200, leaving the apportionment to the Court in case the plaintiff is in law entitled to recover.

There is no doubt that the deceased had a right to be on the ice in the vicinity of the hole. He was not a trespasser. He was upon the ice over navigable water. He was, when he lost his life, at a place "open to," but not "frequented by" the public. The defendants in making the hole through the ice did so in the exercise of their right for the purpose of saving their tug, which, without fault of theirs, so far as appears, had sunk in navigable water. The defendants had no reason to suppose that in the ordinary course of business or travel any one other than those in their employ would be near enough to their boat or to this hole to be, in any way, in danger. While the public had the right to be, or travel, upon the ice, there was no invitation by defendants to deceased or to any of the public to travel upon the ice, or to go near the opening. There was not, apart from what was being done by defendants in the raising of the tug, any work or business being carried on, or any road or way defined by bushes, or marks, or by travel on the ice that would give notice to the defendants that any one would be likely to drive or ride or walk near to where the hole was, and the ice was not in condition to be skated upon.

Assuming that the hole through the ice was made by defendants, it was of sufficient size or area to endanger human life, and so was within the letter of sec. 255, of the Criminal Code, but *Tomkins v. Brockville Rink Co.* (1899), 31 O.R. 124, is authority for the conclusion that, even if defendants are guilty of an offence within the meaning of that section, that of itself does not give the plaintiff a right of action.

The action is founded upon negligence; and, upon all the facts and circumstances of this case which are beyond dispute, I am of opinion that there was not evidence of negligence that should have been submitted to the jury.

Then as to the cause of death, it is quite as reasonable to conclude from the evidence that the deceased voluntarily sat down or fell upon the ice, close to the edge, and perished from cold, as that he accidentally walked into the hole. Upon the evidence, the way in which Plouffe met his death is as consis-

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tent with the theory that he did not fall into the water, as that he did, and that being so, the case should not go to the jury. See *Armstrong v. Canada Atlantic R. W. Co.* (1902), 4 O.L.R. 560. If I am wrong in my present opinion, the plaintiff is entitled to recover, unless the Court considers that the answer to the fifth question is a finding in favour of the defendants on the question of contributory negligence. The defendants contend that it is such a finding. It may have been so intended by the jury. Their answer to the first part of the question is simply "yes." Then they add that deceased might have taken another road. That amounts to nothing; but they further add, "if sober, on a bright night, he might have avoided the hole." Upon the undisputed evidence the deceased was not sober on the evening of the 6th, but this answer is not in my opinion an express finding that deceased was intoxicated. Upon the evidence the night was a bright one, but the finding as to that is not direct, even if it amounts to an argumentative finding. I am of opinion that, although the answer is in two distinct sentences, it must be considered as a whole, and so cannot be considered by me as an answer in favour of contributory negligence. See *Rowan v. Toronto R. W. Co.* (1898), 29 S.C. R. 717.

For reasons given I think action should be dismissed, but without costs.

G.F.H.

[IN THE COURT OF APPEAL.]

THE ELGIN LOAN & SAVINGS CO. ET AL. V. THE NATIONAL TRUST CO., LIMITED.

C. A.

1905

March 17.

Company — Shares — Deposit of Certificates — Bailment — Trust — Detention — Trustee Act — Winding-up — Direction of Master — Jurisdiction — Detinue — Measure of Damages — Price of Shares.

The E. Company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof,—which were put in the name of the defendants, a trust company—with them for safe keeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold same in their safe deposit vaults to the order of the loan company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. Company, the remuneration of the trust company also being provided for, 375 of the shares had been acquired by the E. Company under an agreement with another company, the A. Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendants' possession both loan companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. Company, and the L. & W. Trust Company liquidators of the E. Company. After the commencement of the liquidation proceedings the L. & W. Company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to deliver them up, this action was brought for damages for the detention :—

Held, that the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62 Vict. (2) ch. 15, sec. 1 (O.); for owing to their dual character of trustees of the E. Company and liquidators of the A. Company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding-up of the A. Loan Company, that the whole 575 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery.

Judgment of BOYD, C., 7 O.L.R. 1, affirmed. MACLENNAN, J.A., dissenting.

THIS was an appeal by the defendants and cross-appeal by the plaintiffs from a judgment of Boyd, C., reported 7 O.L.R. 1, the facts relating to which are fully stated in the head note hereto, and in the judgment appealed from.

On February 1st, 1905, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

S. H. Blake, K.C., and W. H. Blake, K.C., for the appellants, and in answer to the cross-appeal. The appellants held the

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stock certificates, not merely as bailees but as trustees with all the incidents of the relationship that apply to a trust. The fact of the word "trust" being used in the letters would shew that a trust was created: *Re Tilsonburg, Lake Erie and Pacific R. W. Co.* (1897), 24 A.R. 378; *Hardoon v. Belilios*, [1901] A.C. 118. The refusal of the defendants to hand over the certificates was a reasonable one, and they are exonerated under 62 Vict. sess. 2, ch. 15, sec. 1 (O.): *Lewin on Trusts*, 11th ed., p. 403; *Anglin on Trustees*, p. 115; *Kerr on Injunctions*, 4th ed., p. 593. The case of *McLeod v. Noble* (1897), 28 O.R. 528, referred to by the Chancellor is distinguishable. There the application was to commit for contempt of Court, which is very different from fixing a trustee with liability for breach of trust. The appellants are also protected by the Master's order. The appellants, on being notified that the Atlas Co had a claim on the stock, made application to the Master, who made the order directing that the stock should not be parted with until further investigation, and although, in the first instance, it was made *ex parte* it was subsequently affirmed on notice to the parties interested. The defendants were anxious to do everything to satisfy the respondents, and suggested a conference with the Master to see if any satisfactory arrangement could be made, but the respondents refused to agree to this. Then on the 30th June they suggested that the stock should be sold and the proceeds paid into Court or into some bank until the right to its ownership was determined, but this was also refused. No demand was made by the respondents on the appellants for the amount due by the Atlas Company, which, under the terms of the agreement, was a condition precedent to the transfer of the stock. The respondents are not entitled to any damages. They did not supply all the information within their power or otherwise act reasonably; and they refused to agree to a sale of the stock on the 30th June. Had they done so no damages would have been sustained, for the stock was then at its highest value: *Wilson v. Hicks* (1857), 26 L.J.N.S.Ex. 242; *Stewart v. Sculthorp* (1894), 25 O.R. 544; *Mansell v. British Linen Company*, [1892] 3 Ch. 159. The case of *Michael v. Hart* (1901), 2 K.B. 867, is distinguishable. There the claim was for wrongful conversion. As to there being no entry in the

Master's books, as required by Con. Rule 681, that rule does not apply to winding up proceedings.

George Gibbons, K.C., and Shirley Denison, for the respondents. The relationship of trustee, as is contended for, did not exist here. It is only necessary to look at the form of the deposit to see that the defendants' position was merely that of bailees. It was therefore their duty, on demand being made on them, to have handed over the stock: *Eberle's Hotel and Restaurant Co., Limited. v. Jonas* (1887), 18 Q.B.D. 459. The provisions of the Trustee Act do not apply to relieve them from liability. It never could be contended that it would apply to justify the violations of the terms of a formal contract. As bailees, they could not dispute their bailors' title: *Biddle v. Bond* (1865), 6 B. & S. 225; *Rogers, Sons & Co. v. Lambert*, [1891] 1 Q.B. 318. Even if the Trustee Act applied, the appellants, to come within its provisions, must have acted honestly and reasonably, while the evidence discloses, that instead of doing so, they were acting in the interests of the Atlas Company, of which they had been appointed liquidators. Then as to the Master's order. The stock was not in the hands of the appellants as liquidators of the Atlas Co., so that the liquidation proceedings did not apply to it. The Master's powers are limited to property in the possession of the liquidators, or of some creditor, who has attorned to the jurisdiction: *Re Brampton Gas Co.* (1902), 4 O.L.R. 509; *British Linen Co. v. South American Mexican Co.*, [1894] 1 Ch. 108. There was therefore no jurisdiction to make the order, and it affords no protection. This is clearly laid down in *McLeod v. Noble*, 28 O.R. 528. The order also was not binding on the respondents, as it was made on an *ex parte* application, and its subsequent affirmance, under the circumstances, has no effect: *Re McCarthy* (1893), 15 P.R. 261; *Cairns v. Airth* (1893), 16 P.R. 100. There is also no sufficient evidence of the order or of its terms. Con. Rule 681 expressly requires all proceedings and orders in the Master's office to be entered in the "Master's Book," and this applies as well to the ordinary proceedings before the Master, as to the winding-up proceedings. As to the damages, the defendants were mere wrong-doers, and the respondents are entitled to receive

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the highest price which could have been procured had a sale been made on the 7th, 8th or 9th July, and they are entitled to claim the difference between the price that could then have been procured and that which could have been obtained on the 11th December and not on the 30th July: *Serrao v. Noel* (1885), 15 Q.B.D. 549; *Brill v. Grand Trunk R.W. Co.* (1870), 20 C.P. 440; *Williams v. Archer* (1847), 5 C.B. 318; *Carnegie v. Federal Bank of Canada* (1884), 8 O.R. 75.

March 17. Moss, C.J.O.:—The sole questions now in dispute are as to the liability of the defendants for damages and as to the *quantum*, if any.

The writ was issued on the 17th of July, 1903, claiming to recover from the defendants the possession of scrip certificates of the Dominion Coal Company common stock, representing 525 shares, and scrip certificates of the Dominion Iron & Steel Company preferred stock, representing 100 shares; also damages, for the detention of the shares, and the sum of \$1,050, being dividends received in respect of them. It now appears that the claim should have been for 50 and not 100 shares of the Dominion Steel & Iron Co.

Soon after service of the writ upon the defendants, an application was made on their behalf for an order staying the proceedings in the action. On the 28th of July, 1903, the motion came on for hearing before the learned Chief Justice of the Common Pleas, who pronounced an order giving the plaintiffs leave to amend their writ and adjourning the motion until the 4th of September, but providing that upon the plaintiffs and the liquidators of the Atlas Loan Company agreeing to do so they should be at liberty to join in the sale of the stock in question, or of any part thereof, and that the proceeds should be held by the defendants, pending the disposition of the action, in the same manner and subject to the same trusts and conditions as the stock was then held under; and further that such sale, if agreed upon and made, should be made reserving the rights of all parties, and without prejudice to any claims which the plaintiffs might have against the defendants for damages for detention of the stock or any part thereof.

On the same day the defendants' solicitors wrote the soli-

citor for the plaintiffs, referring to the order and expressing a hope that the plaintiffs would consult with the "liquidator of the Atlas Loan" (i.e., the defendants) for the purpose of arriving at some arrangement whereby an order for a sale of the stock might be placed, adding that it should be possible to at least agree upon a figure, the acceptance of which would be approved by both parties, when an order could then be placed for the sale at that figure.

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On the 30th of July a letter much to the same effect, written on behalf of defendants by Mr. Home Smith, who was in charge for the defendants of the liquidation of the Atlas Loan Company, was sent to Mr. Moore, the manager of the plaintiffs, The London and Western Trusts Company. The plaintiffs did not respond or make any counter proposition; and on the 11th of September the adjourned motion again came on for hearing before the learned Chief Justice of the Common Pleas, when an order was made reciting the withdrawal by the National Trusts Company, Limited, the liquidators for the Atlas Loan Company, of any claim to the possession of the scrip certificates in question, and directing that upon the defendants handing over the certificates to the plaintiffs to be held by them subject to all the equities attaching, the action be forever stayed save as to the claim for damages or interest.

On the 12th September the defendants handed over the scrip certificates, and paid the sum of \$1,050, received for dividends, to the plaintiffs. The plaintiffs proceeded with the claim for damages and interest. The learned Chancellor awarded damages on the footing of improper detention of the scrip by the defendants until the end of July, 1903.

From this judgment the defendants appeal, contending that no damages should have been awarded.

By their cross-appeal the plaintiffs seek to increase the damages, contending that they should be estimated on the footing of improper detention until the 12th of September, 1903.

The plaintiffs having in this action recovered possession of the scrip from the defendants, are *prima facie* entitled to such damages as they may have sustained by reason of its detention. It was shewn that there was a great decline in the price of the

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shares during the period when their delivery was withheld by the defendants.

The defendants, however, maintain that they should not pay any damages, and upon them is the onus of shewing that they are relieved from liability.

Their first contention is that they were acting as trustees, and that in withholding the possession of the scrip from the plaintiffs they acted honestly and reasonably, and are entitled to the benefit of sec. 1 of the Act 62 Vict. ch. 15 (O.). The first enquiry is whether the defendants are trustees within the scope of the Act. If so, it must be because they were constituted trustees by virtue of the instrument in writing, dated the 19th of August, 1902, upon the terms of which they became possessors or custodians of the scrip. They were not appointed by the Court, nor can it be said that they were persons who (except in respect of that instrument) might be held to be fiduciarily responsible as trustees. In considering the description of trustees and the sort of trusts coming within the Act, regard must be had to the terms of the appointment and the nature of the duties created. But in a general sense it must be obvious that the trustees meant by the Act are trustees engaged in administrative duties with regard to property confided to them for the benefit of others, and that the breaches of trusts mentioned are such as may occur in the course of the management and administration of property held in that way. It can scarcely be meant to apply to the simple case of one person having the custody for another of *indicia* of property upon a mere obligation to restore it to him on demand or request, and in the meantime to take care of it for him. Such a holding partakes much more of the nature of a bailment than of a trust in the ordinary and usual sense in which the word trust is employed in relation to property. For while bailment is defined as "a delivery of a thing in trust for some special object or purpose, and upon contract, express or implied, to conform to the object or purpose of the trust," yet the expression "in trust" is clearly not intended to have the same meaning as when technically used in connection with real property.

Thus in Blackstone's Commentaries, Lewis's edition, vol. 3, p. 431, 432, speaking of some species of trusts, it is said, "But

there are other trusts which are cognizable in a court of law; as deposits, and all manner of bailments :” Beal on Bailments, 6.

In the present case the instrument of the 19th of August, 1902, under which the defendants held the scrip, coupled with the nature of their business and the manner in which they dealt with the scrip up to the time when the difficulties arose between them and the plaintiffs, shew the nature of the holding to have been that of bailment rather than of trust in the sense which would bring the defendants within the provisions of the Act 62 Vict. ch. 15.

But if it be assumed that they came within the Act, I agree with the learned Chancellor that they have not shewn themselves entitled to be relieved. I do not consider that the breach of trust of which—on the hypothesis—complaint is made, is one to which the Act could be made to apply. To begin with, there was a distinct refusal to perform the terms of the trust by handing over or transferring the property on demand. The inception of that attitude was the assumption by the defendants of the position of liquidator of the Atlas Loan Co. There was nothing to prevent their becoming liquidators, but they were nevertheless bound to see that in their dealings they did nothing to prejudice the plaintiffs’ interests or to create any situation whereby the plaintiffs’ title to the scrip might be brought in question. Assuming that as liquidators of the Atlas Loan Co. the defendants rightly believed or supposed that they had some interest in the scrip, they were not justified in making use of the possession acquired from the plaintiffs to give assertion to that claim.

In *Attorney-General v. Munro* (1848), 2 DeG. & S. 122, Vice-Chancellor Knight Bruce said (p. 163): “Now I apprehend it to be conformable to the principles of equity and the course of decisions in this Court, as well as in the Court of Chancery in Ireland, to say that when a person knowingly and expressly acquires the possession of property as a trustee merely, or, being in possession, makes himself, by contract, expressly and without qualification, a trustee of it, he cannot, upon any motion of remitter or otherwise, be allowed effectually to assert against the trust, at least as a defendant in a suit seeking the performance of the trust, any title (paramount and adverse to the trust)

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which he may himself have. That he is wholly and finally to lose the benefit of that title I do not say; but he must assert it (if at all) without deriving—he must assert it so as not to derive—any advantage for it from the possession which he has as trustee, or had in that character.”

Whether the instrument of the 19th of August, 1902, is to be regarded as a declaration of trust or as a contract of bailment, upon its express terms it was the defendants' plain duty to transfer and hand over the scrip to the plaintiffs in response to their letter of the 25th of June, 1903. But instead of doing so, they caused to be written to the solicitors representing them, as liquidators of the Atlas Co., the letter of the 26th of June, suggesting and inviting a claim against the plaintiffs' property. From that time their attention seems to have been directed to assisting the liquidators of the Atlas Co. and impeding the delivery of the scrip to the plaintiffs. Having refused to observe the terms of their trust and taken a position practically hostile to those for whom they held the scrip, it would be neither just or fair to the latter to say that they should bear the resulting loss.

Nor should the defendants be held entitled to rely upon the orders or directions said to have been made by the Master in Ordinary acting as Referee in the proceedings for the liquidation of the Atlas Company. It is manifest that whatever directions were given were obtained at the instance of the liquidators of the Atlas Company, and with a view to their benefit as such. The defendants, as representing the plaintiffs, took no steps to cause themselves to be heard before the Master in Ordinary or to prevent or rescind the orders or directions. There is no record in writing of the orders or directions, and it is proper to assume that the Master in Ordinary had no intention of binding or affecting any except those to whom his authority undoubtedly extended. That authority did not include the defendants as representing the plaintiffs. They were in no way before him, either as creditors, claimants against the estate, or contributories. The defendants, as representatives of the plaintiffs, assented too readily to the supposed embargo on their dealings with the scrip. It was not in any sense in their hands as liquidators of the Atlas Company. They took the

risk of being able to set up the orders or directions as against the plaintiffs. But these having been shewn to be ineffectual, it is not reasonable to ask that the consequences should fall upon the plaintiffs. The defendants are not entitled to throw upon the plaintiffs any loss resulting from the defendants' own action in the matter. Perhaps they may obtain relief in the form of indemnity from the estate of the Atlas Co. Certainly the proceedings can only be regarded as taken in the interest and for the benefit of that company alone. And throughout the defendants ignored their duty to the plaintiffs and insisted on the plaintiffs taking action in matters in which it was the duty of the defendants to act for them and protect their interests.

The plaintiffs did not act unreasonably or improperly in declining the defendants' suggestions that the matter should be dealt with by the Master in Ordinary in the Atlas Co. liquidation. They were under no obligation to submit to the imposition of such terms by the defendants. They were entitled to require the scrip to be handed over to them, and the defendants had no justification for refusing to do so or for insisting upon the question being settled before a forum which had no jurisdiction in the premises. So far, therefore, as liability to damages is concerned, the defendants are without any valid defence.

Then comes the question of the amount, if any, to be awarded. It is argued for the defendants that it was the duty of the plaintiffs to have accepted the proposition of the defendants, said to have been made on the 30th of June, in the course of an interview between Mr. Rundle, representing the defendants, and Mr. Moore, representing the plaintiffs. The suggestion appears to have been made by Mr. Rundle that the shares should be sold and the money paid into Court or into the credit of some bank. Mr. Moore insisted that the scrip should be handed over so that the plaintiffs might deal with it as they were entitled to do.

In the then existing circumstances this was not an unreasonable position to take. The defendants had really no ground for refusing to answer the demand of the plaintiffs, who very properly desired to have the control of their own property. The defendants were not entitled to force upon them the alternative of a sale to be conducted by the defendants. The defendants'

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attitude amounted to a claim to deal with the scrip as if they were the owners. The only concession they seemed willing to make was that the money should be held *in medio*. But this was a reversal of the position and rights of the parties at that time. If there was to be a sale at that time, the plaintiffs were the parties entitled to make it and to receive the moneys derived from it. The defendants had at most but a shadowy interest in 375 shares, and none whatever in the remainder of the scrip. And it is to be observed that the only reason then advanced by the defendants was the order or direction of the Master in Ordinary, which they had sought and obtained in breach of their duty to the plaintiffs. And the fact that the plaintiffs under the circumstances chose to stand upon their rights should not bar them of their right to damages for the refusal to accord to them their rightful position. The position is not identical with that in which the parties were subsequently placed by the order of the 28th of July, as I shall endeavour to shew later on.

Then it is urged that the plaintiffs were not in a position to sell the shares represented by the scrip, because they had not made a demand for payment of the amount payable to them by the Atlas Co. in accordance with the terms of the agreement with that company, dated June 10th, 1902. This objection could apply only to 375 shares in which the Atlas Co. was interested. The remaining 150 shares of Dominion Coal stock and the 50 shares of Dominion Steel & Iron Co. stock were the plaintiffs' absolutely. But as regards the 375 shares there was the most temporary disability. A demand on the Atlas Co. was the merest form. The company was in liquidation and there was no prospect of a demand being complied with by payment. The plaintiffs could have made the demand at any moment after receiving the scrip from the defendants, and they would have been in a position to sell immediately after.

Upon the evidence, it is clear that there was a plain intention on the part of the plaintiffs to sell. They were not intending to hold the shares as an investment. Their intention was to make sale as soon as practicable, in order to bring about a speedy liquidation of the assets for the creditors of the Elgin Loan Co. They were desirous of selling as soon as possible, and at all events whenever the shares reached par in the

market. And they could and would have sold at the figures which were reached early in July.

I think we should conclude that if the shares had been transferred to the plaintiffs they would have sold them during the first ten days of July, at which time the Dominion Coal Co. stock had risen above par, and the Dominion Iron & Steel Co. stock was selling in Montreal at from 58 to 60 per share. Upon this footing, and taking the 31st July, 1903, as the limit, as found by the learned Chancellor, the damages awarded by him appear to be a fair and reasonable compensation to the plaintiffs.

But the plaintiffs, by way of cross-appeal, contend that the period within which the differences are to be fixed is that between the 30th June and the 12th Sept. And but for the order made in this action on the 28th of July, that would be the case. The plaintiffs did not receive actual delivery of the scrip until the 12th of Sept. But the matter having been brought into Court, an order was made which afforded an opportunity to the plaintiffs to avoid further loss in a declining market. True, the order was not framed to provide for a sale under the direction of the Court, but in view of its having been made in the action brought to settle the question of right, and of the financial standing of the defendants, it would have been reasonable for the plaintiffs, if they were desirous of then selling, to have accepted the proposal and allow sales to be made in accordance with the order. The proceeds would have been secure, and the Court could have dealt with them and with all questions of damages. On the other hand, if the plaintiffs were not desirous of selling, there is no reason why they should be entitled to ask damages by reason of a further decline in price. And as the learned Chancellor has held, their unwillingness to agree to a sale at that time is attributable to their disinclination to sell at the then current prices. These considerations create a position entirely different to that arising upon the offer of the 30th June. All parties were now in Court, and the subject matter of the action was before the Court and subject to its jurisdiction. The order made opened the way towards the prevention of further damages, and it was incumbent on the plaintiffs to avail themselves of all reasonable means for

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the attainment of that end. In order to succeed on this branch of their claim they must shew that the damages which accrued after that time were due to the acts of the defendants. But in my view of the circumstances they have failed in this respect.

The appeal and cross-appeal should be dismissed with costs.

OSLER, J.A.:—I agree in affirming the judgment—as to appeal and cross-appeal—for the reasons given by the Chancellor in 7 O.L.R. 1, at p. 4.

MACLENNAN, J.A.:—This was an action brought by the Elgin Loan & Savings Company, and by their liquidators, the London & Western Trusts Company, against the National Trusts Company in respect of 525 shares of a company called The Dominion Coal Company, and 50 shares of another company called the Dominion Iron & Steel Company.

When the action was commenced on the 17th July, 1903, these shares were in the possession of the defendants. They were delivered to the plaintiffs on the 12th of September afterwards, and the statement of claim was not delivered until the 17th of October, and is confined to a claim for damages for detention.

The action was tried by the learned Chancellor, who on the 28th of October delivered judgment in favour of the plaintiff for \$7,100 damages for detention of the shares and \$10.75 for interest on dividends received by the defendants and not paid over promptly, and this appeal is from that judgment.

The main facts and documents are stated and set out in the judgment of the learned Chancellor, 7 O.L.R., p. 1, and so far as there stated need not be repeated, otherwise than by reference.

The origin of the business was an agreement between the Elgin Loan Co. and another company called The Atlas Loan Co., made on the 10th June, 1902. The transaction disclosed by that agreement appears to have been as follows: The Elgin Co. was to lend the Atlas Co., at five per cent. interest, money wherewith to purchase 375 Coal Co. shares, and to receive as security an Atlas Co. debenture for \$55,000, and also the Coal shares. The Elgin Co. was to have the option of demanding repayment of the loan and interest at any time. Upon pay-

ment the debenture and Coal shares were to be returned. The Atlas Co. was to be entitled to sell the Coal shares at any time, and to tender to the Elgin Co. payment of the loan with interest. If the sale resulted in a profit, it was to be divided equally between the two companies; if in a loss, it was to be borne by the Atlas Co. alone. It appears that at that time the Coal Co. was paying dividends at the rate of four per cent. half-yearly, and it was agreed that the Elgin Co. had the option of accepting the Coal Co. dividends in lieu of interest on the debenture.

That agreement was carried out. The Elgin Co. advanced the money, the Coal shares were bought, represented by 15 certificates for different numbers of shares, amounting in all to 375, endorsed by the vendors in blank. The certificates and debenture were transferred to the Elgin Co. The effect of that was that the Coal shares were the property of the Atlas Co., transferred to the Elgin Co. as collateral security for a loan payable on demand, subject to the right of the lenders to an equal share of any profit made on a sale of the shares.

At the time of the completion of the transaction, the share certificates were held on behalf of the Elgin Co. by a firm of brokers, A. E. Ames & Co., and in the month of August, 1902, a correspondence took place between the Elgin Co. and the defendants, with a view to the defendants receiving the certificates for safe keeping on behalf of the Elgin Co. In the course of this correspondence it was pointed out to the latter that it would be necessary to have the shares in the name of the defendants on the books of the Coal Co. to enable them to receive the dividends, one of which was to become payable on the following 1st of October, and it was arranged that this should be done, and that the shares should be transferred to the defendants in trust for the Elgin Company.

This was done accordingly, and on the 19th of August a formal instrument was executed by the defendants, acknowledging the receipt of the certificates, and undertaking to keep them safely, to pay over the dividends, and to deliver the shares to the Elgin Co. upon demand, and all for a specified annual remuneration.

The dividend due on the 1st of October, 1902, and perhaps one or two further dividends, were received by the

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defendants and duly paid over to the Elgin Co., and nothing further occurred until the following year, 1903. In the month of March, 1903, the defendants received from the Elgin Co. two further blocks of shares of fifty and one hundred in the Coal Co., and also fifty shares in the Dominion Iron and Steel Co., to be held by them in the same manner as the 375 shares—in trust for safe keeping and the collection and payment of interest. Some time afterwards the defendants had all the Coal shares placed in one single certificate on the books of the Coal Co., amounting in all to 525 shares. With reference to the last two blocks of shares, it is to be remarked that express authority was given to have the certificates placed in the name of the defendants, in trust for the Elgin Co., in order that the dividends might be collected by them without trouble or expense.

Two important events occurred soon afterwards, which have given rise to this litigation.

On the 8th of June an order was made for the winding-up of the Atlas Co., and on the 22nd of June a similar order was made for the winding-up of the Elgin Co. The defendants' company were made liquidators of the Atlas Co., with a reference to the Master in Ordinary, and the plaintiffs, the London and Western Co. were made liquidators of the Elgin Co., with a reference to the Judge of the county court of the county of Elgin.

The 375 shares had been bought at 140, the 100 shares at 121, and the 50 shares at 116; and they had fallen on the 30th of June to 95½ and 97. The Iron and Steel shares had been bought at 65, and on 30th June had fallen to 54½.

After the winding-up orders were made a correspondence immediately began between the liquidators of the respective companies, the London & Western Company and the National Company, on the subject of the Coal shares. The defendants frankly admitted that they held the 525 Coal and the 50 Iron and Steel shares for safe keeping for the Elgin Co., but stating that they were advised that the Atlas Co. had an interest in them. At this time also the defendants had a general knowledge of the transaction between the Elgin and the Atlas respecting the 375 shares. As to this see Home Smith's letter of 24th June and Rundle's letter of 26th June, although they

did not see the agreement of the 10th June until the 28th July afterwards. They seem to have had some knowledge of one important feature of that agreement, for Mr. Rundle, in his letter of 26th June to Mr. Hunter, the defendants' solicitor in the liquidation, says: "It was understood that the Atlas Company was to control the sale of the stock."

On the 25th of June the manager of the London Co. wrote to the defendants, referring to all the shares held by them: "I shall feel obliged if you will be so good as to forward the scrip to us at London as soon as possible."

The defendants and their officers seem to have thought that, because the Atlas Co. had an interest in the 375 shares, and some right to control the sale of them, they might refuse delivery without the previous consent of the Master in Ordinary. In that respect they were mistaken, and I agree with the judgment that the defendants, merely because they had been appointed liquidators of the Atlas, could not lawfully refuse to comply with the terms of their agreement with the Elgin Co. to deliver the shares "upon demand under proper authority." As between the Atlas and the Elgin Companies, while the Atlas had the right to sell at any time, the Elgin were entitled to hold the shares as their security as long as they were unsold or until their debt was paid. But whatever ground there might be supposed to exist for refusing to deliver the 375 shares, there was not even a shadow of a ground for refusal to deliver the other 150 Coal shares and the 50 Iron and Steel shares.

When, therefore, the action was commenced on the 17th of July the defendants had no defence whatever to the plaintiffs' demand for a delivery of the shares or any of them, and I do not see how it can be maintained that the plaintiffs' rights could be affected by any order or direction made by the Master in Ordinary. The plaintiffs' demand was made against the defendants in their individual capacity, and not in their capacity of liquidators of the Atlas.

The only question, therefore, is the damages to which the plaintiffs are entitled for the detention of the shares from the 25th of June, or, at all events, from the 6th of July, when a formal demand in the name of the plaintiff company and their liquidator was served on the defendants until the 12th of

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September, when the shares were delivered. There was a fluctuation in the value both of Coal and Iron and Steel shares, between the 25th of June and the 12th of September. The value rose for a time and afterwards fell. The value of Coal rose at 7th, 8th, and 9th of July from 93 to 108 or 109, and of Iron and Steel from 42 to 58 or 60, after which both fell very low, and the learned Chancellor has assessed the damages in respect of the Coal shares at \$12 per share and of the Iron and Steel at \$16 per share.

Dealing with this subject, the law is stated in Lindley on Companies, 6th ed. 686, as follows:—"But if the plaintiff shews that the shares have fluctuated in value during the interval between the time they ought to have been delivered and the time of trial, or if they have been delivered, the time of delivery, and that he intended to sell the shares, these circumstances may be taken into consideration in estimating the damages." For this statement of the law he cites a number of cases, and, among others, *Williams v. Peel River Land and Mineral Co.* (1886), 55 L.T.N.S. 689, a decision of the Court of Appeal. That case much resembles the present. The shares had been given up pending the action, and the claim was, as here, for substantial damages for detention. At p. 691 Cotton, L.J., says: "Now, of course, it is a necessary foundation of the plaintiffs' claim that they were prevented from selling by defendants' wrongful act in detaining the certificate and preventing the sale. If the plaintiffs did not intend to sell, and they have got back the stock, they have suffered no damages, and can get no damages, provided the dividends have been paid over to them, which, I suppose, has been done." That view of the law is affirmed by Bowen and Fry, LJJ.

Now, I think the effect of that judgment is that the damages to be recovered are damages for inability to sell, not for mere detention. If there was no intention to sell, then, if the shares have been restored, there will be no damages. It must equally follow that, if they could not have sold whenever they wished, neither in that case have they suffered damage. Assuming that the plaintiffs intended and desired to sell, was a sale prevented by the defendants? The shares were the property of the Atlas.

The Elgin Co. had no right to sell until default of payment, and there could be no default of payment until demand, and it is admitted that no demand of payment was ever made. There is evidence of Mr. Moore, plaintiffs' manager, that on the 30th of June, in an interview with Mr. Rundle, defendants' secretary, the latter suggested a sale and a deposit of the proceeds in a bank. That proposal was rejected, and Mr. Rundle was told that nothing but the shares would satisfy the plaintiffs. Mr. Moore also says that the reason that they wanted to get possession of the shares was in order to recommend a sale to the referee whenever the market price was satisfactory, which would be whenever the shares rose above par. There is no evidence that this desire to sell was communicated to the defendants, and Mr. Rundle says, and is not contradicted, that on the 30th of June, when he proposed to Mr. Moore to have the shares sold, the latter said they did not want to sell, and that what they wanted was their securities. I am unable to understand why the proposal of Mr. Rundle to sell the shares was not acceded to. If that had been done, and if the proceeds had been deposited, the damage and loss now complained of would have been avoided. I think it is clear that the defendants were always ready and willing to have the shares sold, and, having communicated that to the plaintiffs, it cannot justly be said that a sale was prevented by the detention of the defendants. If the shares had been sold—even if the proceeds had been deposited in a bank—the damages now complained of would still have been prevented, and the defendants would have been compellable, with costs, to allow the plaintiffs to receive the money.

I therefore think the plaintiffs' claim for substantial damages fails, and that this conclusion applies to the whole of the shares, both of the Coal Company and of the Iron and Steel.

There is another consideration which is applicable to the original deposit of 375 Coal shares. By the agreement of the 10th June, 1902, the Elgin Co. held the shares simply as collateral security for a debt. No day was named for payment, but the Elgin could demand payment at any time. The Atlas Co. could sell at any time, but there is no express power of sale by the Elgin Co. In *Fisher on Mortgages*, 5th ed., sec. 928,

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the law is stated to be that an implied power of sale is vested in a mortgagee or pledgee of stock where no day is fixed for payment, only after the debt is payable, and after a proper demand and notice, citing a number of cases. See particularly *France v. Clark* (1883), 22 Ch. D. 830.

There is no evidence of a demand of payment ever having been made. That no demand was ever made is expressly admitted. Until then the debt was not due, and the Elgin could not lawfully sell. How then can it be said that the detention of the shares prevented them from selling? Unless and until they demanded payment the debt was not due, and the plaintiffs had no power to sell. If they had no power, they could have no intention, and I think that on this ground the defendants must be relieved of the damages assessed in respect of the 375 shares.

Another ground was relied upon by the defendants, namely, that they were trustees and acted honestly and reasonably, and ought to be excused. I think the defendants were trustees of all the shares. The property in the shares was in them by express arrangement in trust for safe keeping and the collection of the dividends; after they became liquidators of the Atlas, with notice that the latter had an interest in the 375 shares, it was their duty to be zealous with reference to the affairs of that company. They desired to do what was right. They consulted the referee appointed by the Court. They consulted their solicitor, and, while they acted honestly, I cannot say they acted reasonably, or ought to be excused in the course which they pursued.

I think, however, that upon the other grounds which I have indicated the appeal should be allowed with costs and that the defendants should have the costs of the action subsequent to the order of the 11th September, 1903.

I do not think the claim for interest on the dividend received on the 1st July by the defendants, amounting to \$10.25, which was allowed by the learned Chancellor, should make any difference in the disposition of the costs, inasmuch as a larger sum is due to the defendants for the agreed compensation which was tendered to them on the 6th July, and refused.

It remains to consider the cross-appeal of the plaintiffs. The learned Chancellor has not given them the benefit of the highest market price reached by the shares during the retention. That contention is covered by the ground already stated, but it is further covered by the judgment of the Court of Appeal in *Williams v. The Peel River Land and Mineral Co.* already cited, and also by *Little v. The London Joint Stock Bank*, [1891] 1 Ch. 270, 284, and *Mansell v. The British Linen Co. Bank*, [1892] 3 Ch. 159. According to Mr. Moore it was the intention of the plaintiffs still to speculate for a rise until the shares rose above par, and it is mere speculation whether they would have waited until they rose above 105, or to the highest point, or whether they would have sold even then.

The cross-appeal should, therefore, be dismissed with costs.

GARROW, J.A., concurred with MOSS, C.J.O.

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THE CORPORATION OF THE COUNTY OF ESSEX.

High Schools—Payment for County Pupils—Settlement of Amount—Reference to County Judge—Absence of Jurisdiction—Dismissal of Action to Restrain Reference—Res judicata—High Schools Act—1 Edw. VII., ch. 40, sec. 34, sub-sec. 3 (O.).

Sub-sec. 3 of sec. 34 of the High Schools Act, 1 Edw. VII., ch. 40 (O.), which enables the amount to be paid annually by the county for the maintenance of county pupils in a high school to be settled by mutual agreement between the trustees and the county, or on their failure to do so authorizes either party to refer the dispute to the county Judge, who is thereby empowered to settle the same, deals merely with the question of the settlement of such amount, so that there is no jurisdiction to enter upon a reference as to whether the amount paid in a specified year was for that or a prior year, and—the evidence disclosing that the amount so paid was for such specified year—an award fixing the amount payable for such year was held to be invalid. The making of the award and the dismissal of an action brought to restrain proceedings on the reference therefor, but without any declaration being made as to the rights of the parties, did not create an estoppel so as to prevent the question of the validity of the award being afterwards raised. When, therefore, an action was brought to recover the amount fixed by the award, such action was held not to be maintainable and was dismissed. Judgment of Britton, J., reversed.

THIS was an appeal by the defendants from the judgment at the trial in favour of the plaintiffs for \$1,704.73, being the amount fixed by the report, dated May 5, 1904, of the Judge of the county of Essex, as payable under the High Schools Act, 1 Edw. VII., ch. 40 (O.), by the defendants to the plaintiffs, for the maintenance of county pupils at the Windsor High School for the year 1902, under a statutory reference to him by the trustees of the Windsor High School.

The action was tried at Sandwich on the 8th and 9th of June, 1904, before BRITTON, J., without a jury, who, as before stated, found for the plaintiffs for the sum of \$1,704.73.

From this judgment the defendants appealed to the Court of Appeal.

On February 3rd, 1905, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN, and GARROW, JJ.A.

A. H. Clarke, K.C., for the appellants. The evidence shews that the amount for the year 1902 was settled by the mutual agreement of the parties. The county Judge can only act where the parties have failed to agree, and therefore he had no power to fix the amount for that year. The dispute here is whether the amount paid was for that year or for the previous year, and this clearly did not come within the statute. The Judge must have jurisdiction. He cannot assume jurisdiction: Shortt on Informations, Black ed., p. 450; *Wilkes v. Home Life Association* (1904), 8 O.L.R. 91; *Re Barr v. McMillan* (1904) 8 O.L.R. 70. The award of the county Judge is, therefore, illegal, and the matter, was not, therefore, *res judicata*. Neither did the dismissal of the action brought to restrain the Judge from proceeding on the reference have that effect. The Chancellor in that action proceeded merely on the form of the action, and he was of the opinion that it was not the proper mode of testing the authority of the Judge to act; that an arbitrator cannot be restrained by injunction; and there was no finding as to the rights of the parties: *De Mora v. Concha* (1885), 29 Ch. D. 268, *Concha v. Concha* (1886), 11 App. Cas. 541.

J. H. Rodd, for the respondents. No settlement of the amount due for the year 1902 was ever made. The very subject of the dispute between the parties was as to the amount due for that year. What the respondents say is that they sent in each year an account of the amount due for that year, but it was not paid until the following year. Thus the payment made in 1902 was for 1901. No settlement having been made and the amount being in dispute it was properly referred to the county Judge. A special remedy having been given by the statute it must be followed: *Berkeley v. Elderkin* (1853), 1 E. & B. 805; *Bailey v. Bailey* (1884), 13 Q.B.D. 855; *Regina v. County Court Judge of Essex* (1887), 18 Q.B.D. 704; *Vestry of St. Pancras v. Batterbury* (1857), 2 C.B.N.S. 477. If the contention of the appellants were to prevail all they would have to do would be to contend each year that the amount had been paid, and so oust the jurisdiction of the Judge and render the statute nugatory. The award of the county Judge was valid, and is final and conclusive, and therefore

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the matter is *res judicata*. This is the effect also of the judgment of the Chancellor. The same questions were then raised and argued as are attempted to be set up here, which the appellants are estopped from doing: *Barber v. McCuaig* (2) (1890), 31 O.R. 593; *Widder v. Buffalo and Lake Huron R.W. Co.* (1869), 29 U.C.R. 154; *Carpenter v. Commercial Bank of Canada* (1862), 8 U.C.L.J.O.S. 268; *Ross v. The Queen* (1895), 25 S.C.R. 564; Taylor on Evidence, Black ed. 1454.

May 9. OSLER, J.A. :—I am of opinion that the defendants' appeal should be allowed.

If the county had in fact paid the amount payable by it to the board for the year 1902, there was nothing in respect of that year which could be the subject of a reference to the County Judge under 1 Edw. VII., ch. 40, sec. 34, sub-sec. 3, which provides that the trustees and the county may, by mutual agreement, settle annually the amount to be paid by the county for the maintenance of county pupils, and that, if they are unable to agree with respect to such amount, either party may refer the matter in dispute to the county Judge, who shall have power to settle the same. What really seems to have been in dispute was not the amount of the county's contribution, but whether a sum which had been paid, and which, on the face of the receipt given to the county, appeared to have been paid for the year 1902, was applicable to that year or the previous year, a question which the statute gives the parties no power to refer, and the Judge no power to determine, inasmuch as, if it was actually paid for 1902, the amount of the county's contribution had been settled by mutual agreement under the Act, and any award made by the county Judge *in invitum* would be inofficious and could impose no legal liability upon the defendants.

The defendants are not estopped by the record from raising any defence to the award which may be open to them, such as that the arbitrator had no jurisdiction to make it.

The judgment in the former action brought by the county to restrain the Judge from proceeding with the reference is no more than a refusal to interfere with the proceedings before

him on the principle that the Court as a rule does not interfere to restrain an arbitration merely because the arbitrator is proceeding without jurisdiction: see *Farley v. Sanson* (1902), 5 O.L.R. 105; S.C. in app. 7 O.L.R. 639.

The learned Chancellor, before whom that action was tried, said that the statute gave no appeal from the county Judge, and that he would not entertain or anticipate one by a side issue by means of an action to enjoin the reference. He therefore "left the matter in his hands," and dismissed the motion and the action. He does, indeed, seem to have been of the opinion that the claim for the year 1902 had not been paid, and that the case was within the Judge's jurisdiction; but that is not what is adjudged by the judgment in the action, which, without making any declaration of the rights of the parties, such as is asked by the endorsement on the writ of summons, simply dismisses, as I have said, both the motion and the action, and leaves the matter where it was, namely, in the hands of the Judge to make his award *quantum valeat*.

Now, whether the sum which was actually paid as the county's contribution towards maintaining the school on the 10th December, 1902, was in fact applicable to that year and paid in respect of that year, as expressed by the plaintiff's official receipt, depended, as the plaintiffs themselves conceded at the trial and on the argument of this appeal, upon whether the sum payable for the year 1891—the first year when a liability to contribute a proportionate sum towards the maintenance of the High School was imposed by law upon the county—had been paid. The Act by which this liability was imposed was passed at the session of the Legislative Assembly for that year, 54 Vict., ch. 57: assented to 4th May, 1891. Before that time the county had been in the habit of making yearly a voluntary contribution towards the expenses of the school, but their obligation to contribute became fixed under the Act, when, on the 11th June, 1891, the plaintiffs gave the notice required by sec. 31 (2) of the Act that the High School was open to county pupils. For that year, however, such liability could exist only in respect of maintenance for about the last half of the school year. An estimate of the cost of maintenance was submitted by the board, which became the subject of discussion between

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the parties, and, though it cannot be said that any formal agreement was arrived at, the defendants recommended a payment of \$500 in discharge of the plaintiffs' claim, and that sum was, on the 30th December, 1891, paid by the defendants as and for the amount they were liable to pay for maintenance in that year. The receipt given by the defendants therefor is expressed to be for that year. The amount was probably \$100 less than the proportion payable for the half year upon the estimate which had been submitted for the whole year, and the defendants, being liable at most for the proportion of the half-year's maintenance, it appears to have been accepted without demur. The plaintiffs now contend that this sum was paid as the voluntary contribution which the county had been in the habit of making, but of this there is no evidence, and, paid as it was after a legal liability to contribute had arisen, the proper inference is that it was attributable to and was paid in discharge of that liability only.

Then, the amount of the county contribution for the year 1892 was fixed at \$1,000 at the January session of the council for that year, based upon the estimate of the preceding year, and this sum was paid on the 22nd December, 1892, and is expressed in the order given therefor to be for that year, and is attributable to nothing else than a payment in discharge of the county's statutory obligation for that year, and so on for every year thereafter down to and inclusive of the year 1897, a payment was made which, in the order therefor, is expressed to be for each particular year. Payments were also made in the years 1898 and 1899. The errors of date in the orders given for these probably gave rise to the mistaken contention of the board; but, having regard to the payments which had been previously made, it is manifest that there are no other years to which they could be attributed; and in 1900, 1901 and 1902 payments continued to be made which, in the orders given therefor, are expressed to be made for these years respectively.

When all the orders are examined and read in connection with the minutes of the proceedings of the two bodies, it appears that every year has been accounted for, and that the liability of the county for the whole period from 1891 onwards has been

discharged. The action therefore fails, and the appeal must be allowed.

MACLENNAN, J.A.:—I am of opinion that we should allow this appeal.

The dispute between the parties is whether the sum payable by the defendants to the plaintiffs for high school pupils for the year 1902, under sec. 31 (2) of the High Schools Act, 54 Vict. ch. 57 (O.) has been paid.

That sub-section provided that the county council should pay to the high school board of the city the proportionate cost of the maintenance of county pupils at the school; and that in the event of disagreement with respect to the amount it was to be settled by arbitration.

Before that enactment for a number of years the county had been making payments to the board for the support of the school. These payments were, so far as I can discover, voluntary on the part of the county, and not made in pursuance of any statutory or other obligation, after Windsor had become a municipality separated from the county.

The obligation to contribute to the expenses of the school board, therefore, commenced on the 11th June, 1891, when the notice required by sec. 31 (2) was served upon the defendants, and the sum to be paid for that year would be for about half the year.

On the day after receiving the notice there was a discussion between the warden of the county and the school board as to the sum which should be paid, but no conclusion was reached; and on the 24th November an estimate was made by the secretary of the board of the number of county pupils and the cost of each for that year. On the 27th November afterwards a committee of the council reported recommending a payment of \$500 to the board in full for the year 1891, and that sum was paid on the 30th December, 1891.

The question of the payment to be made for the year 1892 was taken up by the county at its meeting in January of that year, and a committee reported that they had been in communication with the secretary of the school board with regard to the expenditure for the year 1891, and had examined a

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statement furnished by the principal of the school of the average attendance of county pupils, and recommended that the sum of \$1,000 should be paid to the board for 1892. That report was adopted, and the sum of \$1,000 was paid to the school board on the 22nd December of that year, and appears in the statement of receipts and expenditure of the board for that year.

It is clear, therefore, that the county paid, and the school board received, the payments imposed by the statute on the county for those two years, 1891 and 1892. It is also clear that the payment for 1892 was estimated and based upon the attendance of county pupils for the previous year, a practice which was followed in all the following years, and which has given rise to the dispute which is the subject of this action.

When the subsequent payments, which are admitted to have been made, are traced down to the year 1902, it is clear beyond dispute that the sum of \$1,392.18, which was paid on the 4th December in that year, was the payment which was due for the year 1902, although it was estimated in the customary manner upon the average attendance and cost of county pupils for the year 1901.

The award made by the county Judge that the sum due for the year 1902 was the sum of \$1,704.73 is therefore erroneous.

That award was founded upon the attendance of pupils in the year 1902, and may have been the proper sum to have paid having regard to such attendance. But the statute gives the county Judge jurisdiction only in case of disagreement between the parties, and the parties had themselves agreed upon the sum to be paid, and it had been paid and accepted accordingly, more than a year before the reference to the county Judge.

It was argued that the award was conclusive, but I do not think so. What the statute, sub-sec. 3, enacts is that the trustees and the county council may by agreement settle the proportionate amount to be paid for the maintenance of county pupils, and in the event of their inability to agree with respect to such amount, either party may refer it to the Judge, who shall have power to settle the same. No such dispute as defined by the statute had arisen. The dispute was whether the sum of \$1,392.18 which had been paid on the 4th December, 1902,

was for the service of that year or of the previous year. And the statute gives no authority to the county Judge to settle such a dispute as that.

I therefore think the award was invalid, having been made without jurisdiction, and that the present action being founded thereon cannot be supported.

It was also contended that the question was concluded by the judgment in an action brought by the defendants for an injunction to stay the proceedings on the reference. That is the defence known as estoppel by matter of record.

That action was commenced on the 11th January, 1904, and on the 21st of January a notice of motion for an interim injunction was served to restrain the school board from proceeding with the reference. The claim upon the writ of summons was for a declaration of the proportion of the cost of maintenance of county pupils, which the plaintiffs, if liable at all, are liable to pay to the defendants; and generally for a declaration of the rights and liabilities of the parties in respect of the maintenance of the county pupils; and for an injunction to restrain the defendant and its officers from proceeding with a reference to the county Judge to settle the amount payable by the plaintiffs to the defendants for the year 1902. There were no pleadings; and on the argument of the motion it was agreed that it might be taken as the hearing of the cause. The action was dismissed, and the judgment entered simply dismisses the action upon reading certain affidavits and cross examinations thereon. The judgment contains no declaration of the rights or liabilities of the parties, such as asked for in the statement of claim, nor any declaration of the validity or otherwise of the reference before the county Judge. The judgment in effect simply refuses to stay the reference, and refuses to make any of the declarations asked for in the endorsement of the summons. When the record relied upon is produced, it contains no adjudication upon the validity of the award. It could not do so, for no award had then been made. It is true that in his reasons for judgment the learned Chancellor expresses the opinion that the question whether the claim of the school board for 1902 had been paid, was within the scope of the reference authorized by the statute; but he also thinks that injunction

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was not the appropriate remedy, and the record does not determine either question. In *Taylor on Evidence*, 9th ed., sec. 1695, it is said "In order that a judgment, should bind parties and privies, it must have directly decided the point which is in issue in the second action," and see notes, *Duchess of Kingston's* case, 2 Sm. L.C., 10th ed., p. 728 *et seq.*

I therefore think the judgment in the former action is no estoppel upon the question of the validity of the award.

The appeal should be allowed, and the action should be dismissed with costs.

GARROW, J.A.:—The real dispute between the parties concerns the payment to be made in the year 1903. And the cause of the dispute very clearly is the change in the amount previously payable created by the amendment contained in the statute 3 Edw. VII., ch. 33, whereby the county's contribution was reduced to 65 per cent., the defendants contending that they are entitled to the benefit of that reduction upon the payment to be made in the year 1903, while the plaintiffs contend that they are not—that in fact in each prior year the payment which the defendants had made (about which there is no dispute) were always paid in discharge of the previous year's obligation, so that the payment of \$1,392.18, made on December 4th, 1902, was really only for the year 1901.

The trustees had no power under sec. 34 of the High Schools Act to compulsorily refer such a dispute to the county Judge, and without the defendants' consent that learned Judge had no power whatever to determine that the amount payable for 1902 is still unpaid, which is the clear effect of his report. The defendants did not consent, but, on the contrary, protested against this asserted jurisdiction, and the reference proceeded subject to this objection. And, finding the opposite view persisted in, the defendants commenced an action to obtain an injunction to restrain the further progress of the reference, which action was heard before the Chancellor on the motion for the injunction, turned by consent into one for judgment, and was on April 2nd, 1904, dismissed with costs: see 3 O.W.R. 403.

The plaintiffs now contend that the question in dispute is *res judicata* by the report of the county Judge, and also by

the judgment in the other action. But this contention is not, in my opinion, well founded. The reference to the county Judge did not authorize him to find that the liability was in respect of the year 1902 or of any other year. He could only, upon the material which the statutes indicates, fix the amount, in case of a dispute as to amount, where the general liability was otherwise not in dispute.

That was not the case in the present instance, and the reference to him was therefore wholly unauthorized. He had not, when the action was heard, made his report, and all the learned Chancellor intended to do, as clearly appears from his judgment, was to refuse to interfere with the reference.

If I am right in my opinion so far expressed it is, of course, obvious that the evidence tendered at the trial should have been received and the merits should have been determined instead of assuming, as was done, that the plaintiffs' contention of *res judicata* was well founded. It was apparently agreed that the evidence so tendered was or was not to be regarded as in, according to the view to be taken of the question of *res judicata*, and I shall, therefore, in what follows now regard it as properly before me. The question to be determined is one purely of fact, and its proper determination depends, in my opinion, in the selection of the proper starting point, which, I think, is at the time when the legal obligation first began, namely, in the year 1891. And Mr. Rodd very candidly admitted that if the payment made in the end of that year was payment for that year and not for the year 1890, his case failed. The town of Windsor separated from the county of Essex on January 1st, 1881, and remained separated until it became a city on April 14th, 1892.

The High Schools Act was passed on May 4th, 1891. Until then the county was under no legal obligation to contribute towards the support of a high school situated in a town separated from the county, or in a city; but by sec. 31, sub-sec. 2, a change was introduced and a county became liable thereafter to pay its proportionate share, upon the trustees of the high school notifying the county clerk that such high school was open to county pupils. Acting under this provision the trustees of the Windsor High School, on June 11th, 1891,

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notified the county clerk of the county of Essex in the manner described by the statute, and on the next day, as appears from a minute in the books of the plaintiffs, a meeting was held between the warden of the county and the Windsor High School Board for the purpose of settling the amount which the county should pay, and a proposition was made by the warden to pay \$500 as a fixed sum per annum, but not accepted by the board. Then on December 30th, 1891, this cheque was issued to and received by the plaintiffs:—

“\$500. Treasurer of the county of Essex.

Pay to the order of Alexander Bartlet Five hundred Dollars due from the county to him for amount granted to Windsor High School for 1891.

F. B. BONTEILLER,
Warden of the County of Essex.

Office of the County Council,
Sandwich, Dec. 30th, 1891.”

Mr. Bartlet was the secretary-treasurer of the Windsor board. He apparently received and used the cheque in due course, and it now appears with his endorsement upon it.

This cheque was preceded by and evidently founded upon a report of the defendants' education committee, dated November 27th, 1891, in which they reported to the warden and council “that, after hearing Alexander Bartlet, Esq., on behalf of the Windsor High School Board, would recommend that \$500 be paid to the said school as the county's proportion in full for the year 1891.” And in the plaintiffs' minutes of November 24th, 1891, it is stated that the secretary reported that “he had made up the account of the high school as nearly as *at present* it could be ascertained, and that there has been at the high school 97 pupils from town, 41 from county, and 5 from Walkerville; that the cost per pupil, after deducting government, will be in the neighbourhood of \$30 per scholar.”

The language of this minute leaves no room for doubt that the estimate then being made was for the then current year, and not for the previous year, because for the latter the account must then have been complete and an estimate quite unnecessary.

And the circumstance of this minute followed three days after by the report of the defendants' educational committee, after hearing Mr. Bartlet, the officer who had made the estimate, leaves no room for doubt that what both parties then intended and understood was to fix the amount to be paid by the defendants for the year 1891, which, after all, was not a full year, as the Act only came into force on May 4th. And following upon this was the cheque before set out, plainly expressing on its face that it is "for amount granted to Windsor High School for 1891," and which was accepted by plaintiffs without objection of any kind, so far as appears. It is true the defendants had previously made grants in each year for several years prior to 1891, but these were wholly voluntary, and not in any way based upon allowance or expenditure as became the case under the Act of 1891, and as made in each year were plainly for that year only, and not for a previous year, and were usually so expressed in the cheques; the next previous one, the only one which could bear upon the question in this action, bears date January 23rd, 1891, is for \$500, "for amount granted to Windsor High School for 1890." Then following upon the cheque before set out are yearly cheques for 1892, 1893, 1894, 1895, 1896, and 1897, all paid at or near the end of each of these years, all expressing on their face for what year they were given, and all in like manner accepted and received by the plaintiffs without objection. In 1898 the cheque expresses on its face that it was for the year 1897, and the same with the cheque issued in 1899, which on its face says that it is for the year 1898. But the cheque issued in 1900 again follows the course of the first seven, and says it is for the year 1900, and the same in 1901 and 1902. Certain statements submitted from time to time by the plaintiffs to the defendants were produced and much relied on by the plaintiffs. They shew that the amounts payable from year to year were calculated upon the previous year's attendance, which is, I think, what the statute intended, but this circumstance could not alter the fact really in question, that the amount to be paid in 1903, however arrived at, was in fact the payment for that and not for the previous

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year, and therefore one to which the reduction authorized by the statute 3 Edw. VII., cap. 33, would apply.

So that, upon the whole, and for the reasons given, I am of opinion that the defendants' contention is correct, and that the appeal should be allowed, and the action dismissed, both with costs.

Moss, C.J.O., concurred in allowing the appeal.

G. F. H.

[IN THE COURT OF APPEAL.]

FORSYTHE V. CANADIAN PACIFIC RAILWAY COMPANY.

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Master and Servant—Nuisance—Course of Employment—Piling Ties on Highway.

A number of worn out railway ties were taken from the line of railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men intending to take them to his house for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured:—

Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore *prima facie* responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses generally, this being an essential element of liability, a new trial was necessary.

Judgment of a Divisional Court reversed.

APPEAL by the plaintiff from the judgment of a Divisional Court.

The plaintiff, who was a contractor living in Kemptville, brought the action to recover damages for injuries sustained by him on the 24th of August, 1903, because of his horse being frightened by a pile of old railway ties placed on a highway at a crossing of the defendants' line of railway near Kemptville. The horse shied at the ties and swerved and the buggy in which the plaintiff was driving went into the ditch by the side of the highway, and the plaintiff was thrown out and severely injured.

The contention of the plaintiff was that the ties had been placed on the highway by servants of the defendants in the course of their employment. The evidence shewed that the ties, which were worn out, had been taken from the road-bed in the ordinary course by the section men of the defendants, and had been left lying beside the track. It was also shewn that worn out ties were either burnt beside the track or were taken by the section men to their homes for firewood. The ties in question were brought on hand cars by the section men during working hours to the highway crossing and were piled on the highway just outside the line of the travelled way, the foreman of the section men—Dunlop—intending to take the ties to his house

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for firewood. It was not shewn how far from the crossing his house was.

The action was tried at Brockville on the 18th of October, 1904, before ANGLIN, J., and a jury. At the close of the plaintiff's case a motion for a nonsuit was made, but subject to this motion the trial was continued, and at the close of the case questions were submitted to the jury, and these with the answers thereto were as follows:

1. Were the ties in question placed on the highway by Dunlop and his section men in the discharge of their duties as servants of the defendant company? Yes.

2. Was the presence of these ties on the highway the cause of the injuries sustained by the plaintiff? Yes.

3. What damages did the plaintiff sustain? \$4,000.

The learned Judge gave effect to the motion for a nonsuit, holding that there was no evidence to support the second finding.

An appeal by the plaintiff to a Divisional Court, [MEREDITH, C.J.C.P., MACMAHON, and MAGEE, JJ.] was argued on the 9th of January, 1905, and on the 10th of January, 1905, was dismissed with costs.

The further appeal to this Court (by leave) was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 30th of May, 1905.

Charles Millar, for the appellant. There was evidence upon which the jury could properly find that in placing the ties on the highway the section men were acting in the course of their employment, and that being so the defendants should have been held liable for the accident. An act complained of may be beneficial to the servant who does it and yet may be done by him in the course of his employment. The judgment below has proceeded on the erroneous view that the ties were placed on the highway for the benefit of the foreman, and, therefore, that they were not placed there in the course of the employment of the section men. But this view is based on a fallacy. The ties had to be collected and gotten rid of. In collecting them and in

getting rid of them the section men were acting on behalf of and for the benefit of the defendants, and it was quite immaterial whether after the ties had been collected they were to be destroyed or were to be taken away by the foreman or any other person for his own use. Until they were actually taken away they remained the property of the defendants and at their risk. While piled for destruction or removal the injury was done and the defendants are responsible. If the foreman had, even in disobedience of orders, and without intention to use the ties for himself, ordered them to be piled on the highway instead of burning them on the defendants' property the defendants would have been liable, and the fact that there was the possible intention of removing the ties for use as firewood makes no difference in the legal aspect of the matter: *Citizens Life Assurance Co. v. Brown*, [1904] A.C. 423, at p. 428; *Bayley v. Manchester, etc., R.W. Co.* (1873), L.R. 8 C.P. 148. The case is not like *Sanderson v. Collins*, [1904] 1 K.B. 628, where the carriage was taken by the coachman for his own purposes only, but is more like *Joel v. Morison* (1834), 6 C. & P. 501; and *Sleath v. Wilson* (1839), 9 C. & P. 607.

I. F. Hellmuth, K.C., and *W. H. Curle*, for the respondents. It is of course clear law that a master is liable for the acts of his servant only if those acts have been done in the course of the servant's employment. The plaintiff has failed to make out in this case that the piling of ties on the highway was so done. They were brought to this particular place for the benefit of the foreman and for his use. It is true that the work was done by the section men in the employment of the defendants and during working hours, but had it not been for the special directions given by the foreman, the ties would have been burned on the property of the defendants. The moment the foreman decided to take the ties for his own use they became his property, and after that the defendants had nothing further to do with them. The defendants had no right to use the highway for the purpose of piling ties upon it, and cannot be liable because their servants did, without express instructions, something which the defendants themselves could not legally do: *Lyons v. Martin* (1838), 8 A. & E. 512; *Peachey v. Rowland* (1853), 13 C.B. 182; *Wilson v. Rankin* (1865), 34 L.J.Q.B. 62, 35 L.J.Q.B. 87.

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It is not shewn that the foreman had been given permission to take the ties. It is true that there is some evidence that the section men had been in the habit of sometimes taking the ties for use as firewood, but there is nothing to shew that the defendants knew of this having been done or had acquiesced in this mode of disposing of the ties. The section men had no more right to pile the ties on the highway than they would have had to throw them from the property of the defendants on an adjoining farm at the foreman's instance and to leave them there for his convenience. The relationship of master and servant in the doing of this work was severed the moment that the foreman made up his mind to keep the ties for his own use, and in consequence of coming to that decision proceeded to dispose of them in a manner specially suited to meet his own convenience. The case is in principle not distinguishable from *Sanderson v. Collins*, [1904] 1 K.B. 628. See also *Pittsburg, etc., R. W. Co. v. Maurer* (1871), 21 Ohio St. 421; *Tinker v. New York Ontario and Western R. W. Co.* (1893), 71 Hun 431, (1895), 92 Hun 269, (1898), 157 N.Y. 312, particularly at pp. 317, 318. In any event the damages are excessive.

Millar, in reply.

June 29. The judgment of the Court was delivered by GARROW, J.A.:—William Torrance, a section man, called by the plaintiff, deposed that the ties were placed on the highway by himself and Robert Murphy, another section man, and William Dunlop, the section foreman, the others acting under the direction of the latter. Then in cross-examination counsel for the defendants asked: "And you knew who was taking these there, Mr. Dunlop? Yes. To burn them for his own use? Yes. For firewood? Yes."

And upon this rather slender foundation is constructed the defence which has so far succeeded, namely, that the defendants' servants in placing the ties upon the highway were not acting within the scope of their employment or for the defendants, but for the section boss Dunlop.

As has been said more than once, I think the rule of law in such cases is reasonably clear, but the difficulty arises in applying the law to the facts: see *per* Lord Coleridge, C.J., in

Rayner v. Mitchell (1877), 2 C.P.D. 357, at p. 359. In that case the learned Chief Justice says: "It was laid down in Lord Holt's time, and repeatedly since, that, wherever the master intrusts a horse or carriage, or anything which may readily be made an implement of mischief, to his servant, to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant, so long as the latter is using it or dealing with it in the ordinary course of his employment. That is undoubtedly a correct statement of the law." And in *Pollock on Torts*, 7th ed., p. 84, it is said: "Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. . . . Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be 'on a frolic of his own' the master is no longer answerable for the servant's conduct."

In *Storey v. Ashton* (1869), L.R. 4 Q.B. 476, Cockburn, C.J., says: "The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant," while in the same case Lush, J., still more succinctly states the rule to be as follows: "The question in all such cases is whether the servant was doing that which the master employed him to do. If he was, the master is liable for the negligence just as if he himself was guilty of it."

Now within these definitions was there evidence that the defendants' servants placed the ties in question on the highway in the course of their employment? This is purely a question of fact, and, in my opinion, and with deference, I think there was reasonable evidence from which a jury might so infer. Their employment or duty at that time was to get rid of the no longer useful and now encumbering ties, and to do so two modes are suggested—both of which had previously been adopted—one to burn them on the defendants' own lands, the other to permit

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their workmen to take them home for firewood. By either method the defendants' purpose would have been accomplished.

But the ties were the property of the defendants and there is no evidence to shew that they had ceased to be their property when placed on the highway, even assuming what was certainly not proved that Dunlop, who was not called, intended to afterwards remove them to his own house. The work was done by the defendants' workmen during their ordinary working hours, and under the superintendence of the section boss, and apparently in good faith.

Under these circumstances, I think the plaintiff made out a *prima facie* case, and the issue was properly for the jury.

But unfortunately there is no specific finding of fact upon the vital question of nuisance or no nuisance, which was essentially the plaintiff's cause of action. A nuisance such as the one in question is not necessarily created by placing an object or doing an act causing one horse to be frightened, but by doing something upon or near the highway which is calculated to frighten horses generally under ordinary circumstances: see *Roe v. Lucknow* (1893), 21 A.R. 1.

It is the more unfortunate, perhaps, because as appears in the notes of evidence, there was evidence of other horses having been frightened, and plaintiff's counsel was, apparently, quite alive to the necessity of such a finding, and requested that the jury should be so instructed, and I was inclined at first to think it might, under the circumstances, be proper to regard the matter as having been really passed upon by the jury and to be necessarily included in the answer to the second question. But on referring to the charge it appears that the jury were not told that the question of nuisance or no nuisance depended not so much on the particular result to the plaintiff's horse, but, as I think they should have been, on the larger and more general result to horses generally, as before indicated.

Then the damages awarded are large, so large indeed as to appear excessive, and upon the whole I think the proper result is to allow the appeal and direct a new trial, when doubtless the matters now in doubt will be cleared up, and a more satisfactory result arrived at.

The appeal should be allowed with costs, and the costs of the former trial, and of the motion in the Divisional Court, should be costs to the plaintiff in any event.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL FOR ONTARIO v. LEE.

Revenue—Succession Duty—"Aggregate Value" of Property—Incumbrances.

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June 29.

AN appeal from the judgment of Falconbridge, C.J.K.B., reported 9 O.L.R. 9, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A. on the 2nd of June, 1905, and on the 29th of June, 1905, was dismissed, the Court agreeing with the construction of the Act adopted in the judgment appealed from. See now 5 Edw. VII. ch. 6.

W. R. Riddell, K.C., for the appellants.

Frank Ford, for the respondent.

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[IN THE COURT OF APPEAL.]

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June 29.

REX V. CRUTTENDEN.

*Trademark—Criminal Law—Forgery of Trademark—Criminal Code, sec. 447—
Descriptive Words—"Glyco-thymoline."*

A person prosecuted under sec. 447 of the Criminal Code for forging a trademark or for falsely applying to goods a mark so nearly resembling a trademark as to be calculated to deceive is entitled to shew in his defence, just as under *Partlo v. Todd* (1888), 17 S.C.R. 196, and *Provident Chemical Works v. Chemical Manufacturing Co.* (1902), 4 O.L.R. 546, he might do in answer to an action for infringement, that the trademark in question is invalid, its registration not being conclusive.

The section of the Criminal Code in question does not apply to a case of "passing off" goods as those of another.

The words "glyco-thymoline" as applied to a compound of glycerine and thymol are descriptive merely and are not properly the subject of a trademark.

Conviction quashed.

CASE reserved by George T. Denison, Esquire, police magistrate in and for the city of Toronto, pursuant to the direction of this Court.

The following statement of the facts is taken from the judgment of Moss, C.J.O.:—

The defendant was charged upon the information of one Charles Rose, but at the instance of the Kress & Owen Company, chemists and manufacturers of pharmaceutical preparations, with the offence of forging a trademark, to wit, the trademark "glyco-thymoline," and falsely applying to certain goods a trademark, or mark so nearly resembling a trademark, as to be calculated to deceive, contrary to sec. 447 of the Criminal Code and amendments.

By the defendant's consent the charge was tried summarily by the police magistrate, who convicted the defendant and remanded him for sentence.

The police magistrate submitted the following questions for the opinion of the Court:

1. Whether upon the evidence, as adduced before me, the defendant Thomas Cruttenden was guilty as charged.

2. Whether the said Thomas Cruttenden in using the words "glyco-thymol" on his preparation is guilty of falsely applying to the goods in question the trademark of Kress & Owen

Company, or so nearly resembling their trademark as to be calculated to deceive, within the meaning of sec. 447 of the Criminal Code of Canada.

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3. Whether the trademark of Kress & Owen Company is a proper subject of a trademark, and, if so, does the use by the defendant of the words "glyco-thymol" under the circumstances as set out in the evidence, make him guilty of a violation of the provisions of sec. 447 of the Criminal Code.

The trademark which the defendant is charged with forging and falsely applying is registered in Canada, and consists solely of the words "glyco-thymoline," which is said to be the name of a medicinal compound sold by the Kress & Owen Company in the form of a solution put up in bottles.

The defendant makes and sells a solution of which the chief ingredients are thymol and glycerine, which he has named "glyco-thymol."

Both parties label their bottles in much the same manner. On one side of the Kress & Owen Company's bottle there is a label with the words "glyco-thymoline," and on the opposite side is a label giving directions for use. On one side of the defendant's bottle there is a label with the words "glyco-thymol," and on the opposite side directions for use in much the same terms as in the Kress & Owen Company's label.

The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 2nd of June, 1905.

John Macgregor, and *J. B. Mackenzie*, for the appellant. There is no evidence upon which the conviction can be supported. The name applied by the defendant to the compound made by him correctly describes its nature, and was applied by him to it in good faith. "Glyco" is a well-recognized contraction for the word "glycerine" when used in medicinal compounds, and "thymol" is the name of a standard article. It is impossible to say therefore that to apply to a compound consisting of glycerine and thymol the name "glyco-thymol" is to forge an alleged trademark "glyco-thymoline." The learned magistrate was wrong in holding that the regis-

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J. W. Curry, K.C., for the private prosecutors. There was in this case a good subsisting trademark, and that is sufficient to make out the title of the prosecutors. The name used by the defendant is almost exactly the same as the prosecutors' registered trademark, and the intent of the defendant to pass off his goods as those of the prosecutors has been made out. Assuming that the defendant is entitled to shew if he can that the prosecutors' trademark is invalid, he has failed to do so. The Canadian Act relating to trademarks is very much wider in its terms than the Imperial Act and the English cases do not apply. Under the English Act special restrictions are imposed, and it is expressly provided that a merely descriptive word cannot be registered as a trademark. The differences between the two Acts are alluded to in *Provident Chemical Works v. Canada Chemical Manufacturing Co.* (1902), 4 O.L.R. 545. The American cases are more in point, and they shew that the trademark in question here is a valid one: see for example *Burnett v. Phalon* (1862), 9 Bosw. 192 ("cocoaine"); and *Keasbey v. Brooklyn Chemical Works* (1894), 142 N.Y. 467 ("bromo-caffeine").

Macgregor, in reply. An attempt to pass off goods as those of another does not come within the section, and has not in fact been made out.

June 29. The judgment of the Court was delivered by Moss, C.J.O.:—The defendant's position is that the words "glyco-thymoline" used by the Kress & Owen Company are merely descriptive words and cannot be the subject of a valid trademark, and that the solution which he makes and sells is properly described by the words "glyco-thymol."

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It is to be regretted that the questions raised were not made the subject of a civil action instead of resort being had to the provisions of the criminal law. The defendant appears to be carrying on an extensive business as retail druggist and chemist, with at least two establishments in the city of Toronto.

He appears to have in stock and to sell the Kress & Owen Company solution as well as his own, and to supply whichever is called for by a customer. His business is carried on openly, and so far as the evidence discloses he is a responsible man. Under the circumstances it would be much more fitting that the respective rights of the Kress & Owen Company and the defendant should be tried and determined either in the Exchequer Court of Canada or in the High Court of Justice for Ontario.

At the trial the case was virtually dealt with as a case of passing off the defendant's goods for those of the Kress & Owen Company, which was not the offence charged, and could only be the subject of a civil action for injunction and damages. It is not at all the same thing as forging or falsely applying a trademark.

But the defendant is not to be deprived of his rights because of the form in which the proceedings have been launched against him. He ought not to be deprived of the benefit of defences which would be open to him in a civil action. It is well settled that in an action for infringement of a trademark it is open to the defendant to shew by way of defence that the plaintiff has no legal title to the exclusive use of the trademark that he has registered. The defendant is not driven to an application to remove the trademark from or to rectify the register. This was decided by the Supreme Court of Canada in *Partlo v. Todd*, 17 S.C.R. 196, with reference to the Trade-marks Act as it then stood, and by this Court in *Provident Chemical Works v. Canada Chemical Manufacturing Co.*,

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4 O.L.R. 545, after the amendments made to the statute since *Partlo v. Todd* was decided.

Reference may also be made to *Spilling v. O'Kelly* (1904), 8 Ex. C.R. 426.

The president of the Kress & Owen Company in his evidence before the police magistrate stated that they have a trademark in every country in the world, but this, it is scarcely necessary to remark, is not proof of the existence of such trademarks. The only trademark within the meaning of the term as defined by sec. 443 of the Code which has been proved is the one registered in Canada.

It is not at all satisfactory to be obliged to deal with the validity of a trademark or to determine whether the words claimed can form the subject of a valid trademark upon the evidence adduced in this case. It may be that upon a fuller investigation it can be demonstrated that the trademark as registered confers upon the Kress & Owen Company the exclusive right to use the registered words. But dealing with the question as presented upon the evidence in order to answer the questions submitted by the case, the conclusion must be that it has been shewn that the trademark does not give title to the exclusive use of the registered words. It cannot, therefore, be enforced against the defendant in this proceeding. The words are merely descriptive, and although, as pointed out by Mr. Curry, the language of our Trademarks Act differs from that of the English Act in that it employs more, and perhaps somewhat wider terms, yet under our law, as under the English law, a merely descriptive word or name, that is, a word or name which merely denotes the goods or articles or some quality attributed to them, is not capable of registration as a trademark: *Provident Chemical Works v. Canada Chemical Manufacturing Co.*, 4 O.L.R. 545.

This conclusion answers the last question submitted in the defendant's favour. And upon that the answers to the first and second questions naturally follow in his favour.

The result is that the conviction must be quashed.

R. S. C.

[BOYD, C., and TEETZEL, J.]

IN RE SAULT STE. MARIE PROVINCIAL ELECTION, 1903.

LAMONT'S CASE.

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May 16.

Parliament—Corrupt Practices—Incriminating Evidence—Certificate of Judge—Election Act—R.S.O. 1897, ch. 9, sec. 189 (a) (b)—Evidence Act, 4 Edw. VII., ch. 10, secs. 5, 21 (O.).

Where upon a summons calling on the defendant to shew cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act, R.S.O. 1897, ch. 9, the only evidence taken was his own, and was given by him under the general objection that he should not be called on to criminate himself:—

Held, that by virtue of sec. 189 (a) (b) of the Election Act, R.S.O. 1897, ch. 9, the defendant having answered truly all questions put to him, was entitled to be indemnified against any penal results of his disclosures, and could not be convicted on his own testimony.

Held, also, that sec. 21 of the Evidence Act, 4 Edw. VII., ch. 10 (O.), had no application, inasmuch as this was not a case where "but for that section the witness would have been excused from answering."

After the trial of a petition against the election of a member for the Ontario Legislative Assembly for the electoral district of Sault Ste. Marie, which election took place on October 20th and 27th, 1903, and the trial on September 13th-17th, 1904, a summons was issued against J. D. Lamont to shew cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act as mentioned in the judgment.

The hearing of the summons proceeded at Toronto, on May 13th, 1905, before BOYD, C., and TEETZEL, J., the trial Judges.

R. McKay, for the defendant, referred to sec. 189 (b) of the Election Act, R.S.O. 1897, ch. 9, and contended that no conviction could be made on Lamont's evidence, which was the only evidence there was.

E. E. A. DuVernet, for the Crown, contended that the witness had answered voluntarily; and that he was not compelled to give evidence: Evidence Act, 4 Edw. VII., ch. 10, secs. 5 and 21 (O.).

May 16. BOYD, C.:—Upon the summons issued calling upon Lamont to shew cause why he should not be found guilty of certain alleged corrupt practices under the Election Act of Ontario, R.S.O. 1897, c. 9, such as illegally paying railway fares

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to voters, and providing refreshment for voters contrary to the statute, and for bribing certain voters—the only evidence taken was that of the person accused which was given under the general objection raised by his counsel that he should not be called on to criminate himself. We directed him to give evidence and he did so, making personally no objection to answer any of the questions asked. His own evidence is sufficient to shew that he has in some respects acted in contravention of the provisions of the Election Act, and is exposed thereunder to certain penalties. It is argued that his evidence was taken under the provisions of the general Act as to testimony, 4 Edw. VII. ch. 10, sec. 21 (O.), by which it is provided that no one shall be excused from answering on the ground of possible self-incrimination provided that he objects to answer on that ground.

The general claim of privilege, however, was made on behalf of Lamont by his counsel at the outset, and besides this the provisions of the general Evidence Act do not derogate from or supersede the special and particular provisions of the Election Act as to the investigation of corrupt practices and the trial of persons connected therewith. By the Election Act the person accused is not excused from answering on the ground of possibly or surely inculpating himself; he must answer but his testimony is not to be used against himself in that inquiry, and if he answers truly he is entitled to claim a certificate of indemnity: sec. 189 (a) (b). The new section of the Evidence Act applies only to cases where "but for the section the witness would have been excused from answering," and this is manifestly not such a case where the evidence is by the prior Election Act compellable.

In the result therefore it is our clear opinion that Lamont having answered truly (so far as we can judge) all the questions put to him is entitled to be indemnified against any penal results which might otherwise follow from the disclosures he has made and he cannot on this proceeding be convicted on his own testimony, and against him there is no other. He gets his certificate and pays no costs.

TEETZEL, J., concurred.

A.H.F.L.

[STREET, J.]

PUFFER V. IRELAND ET AL.

1905.

March 17.

Distress—Payment of Rent, after Distress, to Mortgagee—Continuation after Payment—Bailiff—Costs of Distress—Costs of Action—Counterclaim.

Rent being in arrear, the landlord distrained, and the tenant then paid the rent to the landlord's mortgagees, who had previously given him notice to pay to them (their mortgage money being in arrear), and threatened him with proceedings if he did not do so:—

Held, that the tenant, having paid the mortgagees under compulsion, was entitled to be relieved from the distress and from further liability to the landlord; but the distress was lawful when made, and the landlord was entitled to retain a sufficient quantity of the goods until the costs of the distress were paid.

The tenant sued the landlord and bailiff, claiming an injunction to restrain them from proceeding with the distress, and damages, and the landlord counterclaimed for the rent and costs of the distress:—

Held, that the action should be dismissed as against the bailiff with costs; that the landlord should have judgment against the plaintiff for the costs of the distress without costs of the counterclaim; and that there should be no costs of the action between the plaintiff and the landlord.

ACTION by a tenant against his landlord and the landlord's bailiff to restrain the defendants from proceeding with a distress for rent, and for damages.

The action was tried before STREET, J., at Cobourg, without a jury, on the 14th of March, 1905.

F. L. Webb and *A. J. Armstrong*, for the plaintiff.

W. L. Payne, for the defendants.

March 17. STREET, J.:—The facts were as follows:—

On the 23rd January, 1884, the defendant Ireland, being the owner of a farm of 90 acres in the township of Brighton, conveyed it by way of mortgage to C. R. W. Biggar and others, trustees, to secure \$1,600 and interest, the principal being due on the 23rd January, 1889, and the interest yearly meantime.

On the 12th March, 1903, the defendant Ireland demised the same premises by lease under seal to the plaintiff for five years at an annual rent of \$150, payable on the 1st October in each year, the first payment to be made on the 1st October, 1903.

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At the time this lease was made, the mortgage remained unpaid; the plaintiff paid to the defendant Ireland the rent due on the 1st October, 1903.

On the 29th September, 1904, the mortgage still remaining unpaid and being in arrear, the mortgagees gave notice to the plaintiff that they were mortgagees, and claiming payment of all rents due or accruing due from him, and threatening him with proceedings if he did not pay to them.

Upon the 22nd November, 1904, the defendant Sweet, as bailiff for the defendant Ireland, acting under a distress warrant, seized a quantity of property of the plaintiff on the premises and remained in possession for 17 days. On the 26th November, 1904, the plaintiff paid to the mortgagees the rent which had become due on the 1st October, 1904, with interest, and gave notice to the defendants that he had done so. On the 28th November, 1904, the plaintiff brought this action against the landlord Ireland and his bailiff Sweet for an injunction restraining further proceedings upon the distress, and for damages.

The defendant Ireland claimed to be entitled to the rent, alleged that he was entitled to distrain and hold the distress for it, and counterclaimed for it. Upon the application of the plaintiff, an injunction was granted on the 30th November, 1904, restraining the defendants from proceeding under the warrant; and this injunction was by order of the 8th December, 1904, continued to the hearing, the plaintiff's solicitor, who was solicitor also for the mortgagees, agreeing to hold the \$150 and interest paid him by the plaintiff until it should be determined whether the mortgagees or the defendant Ireland were entitled to it.

The plaintiff, having, under compulsion of the mortgagees, and after notice from them claiming the rent due from him under the lease, paid it to them, was entitled to be relieved from the distress and from further liability to his landlord Ireland: *Corbett v. Plowden* (1884), 25 Ch. D. 678; *Underhay v. Read* (1887), 20 Q.B.D. 209; *Smith's Leading Cases*, 11th ed., pp. 522-4.

The only circumstance in which the present case differs from the authorities I have referred to is in the fact that here

the landlord distrained before the plaintiff had paid his rent to any one. This fact made the distress lawful when it was made, but did not disentitle the plaintiff to protect himself in his holding by paying it to the mortgagees, who had claimed it and threatened him with proceedings if he did not pay it. Whether the payment to the mortgagees is to be treated as an attornment to them and the creation of a new tenancy, or as a payment compelled by the holder of a paramount title and made to avoid eviction by him, I think it can be set up as an answer to the claim of the landlord: *Johnson v. Jones* (1839), 9 A. & E. 809, 813; *Forse v. Sorereen* (1887), 14 A.R. 482.

The position is the same as if the plaintiff, after the defendant had distrained his goods, had paid the rent to the landlord himself. The distress was originally lawful, and the landlord was entitled to retain the distress until not only the rent but the costs of the distress should be paid. Until payment of these, the plaintiff was not entitled to any relief. The contest between the parties other than the defendant Sweet appears to have turned upon the question as to whether the plaintiff was entitled to pay his rent to the mortgagees or not; upon this the defendants have failed. On the other hand the defendants were entitled to be paid their costs of distress before a replevin or injunction could properly be granted, because the seizure and proceedings down to the time the plaintiff paid his rent to the mortgagees were proper and regular; and they were entitled to retain a sufficient quantity of the goods until the cost of distress were paid.

Under these circumstances there was no cause of action against the bailiff, and the action should be dismissed as against him with costs; there should be no other costs awarded to either party; and the plaintiff must pay to the defendant Ireland \$12 for costs of the distress and possession under the counterclaim; no costs of the counterclaim, because the full rent was claimed under it.

E. B. B.

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[STREET, J.]

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FRASER V. DIAMOND.

March 15.

Way—Dedication of Highway—Public User—Crown Lands—Locatee—Acquiescence—Subsequent Grant without Reservation—Rights of Public—Order of Sessions.

In 1834 an order of the quarter sessions was made under 50 Geo. III. for the opening of a highway through several lots, the title to one of which was still in the Crown, although it had been recently occupied under a license from the Crown. The road described in the order was never opened, but another road, following the same general direction, was opened across this lot and others in 1835 or 1836, and was ever after regularly travelled and used as a highway, fenced off from the lot referred to, improved from time to time by statute labour and public money, and treated by the locatee and his successors in title as a public highway. In 1904 the plaintiff, claiming to be the successor in title of the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road was made :—

Held, that the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the plaintiff's obstructions, and was not liable in trespass for having done so.

There was evidence of dedication by the equitable owner, acquiesced in by the Crown ; and the fact that a sessions order was made for the establishment of a highway, but never acted upon, was no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication.

ACTION for trespass to land. The facts appear in the judgment.

The action was tried before STREET, J., at Cobourg, on the 13th March, 1905, without a jury.

E. D. Armour, K.C., and A. B. Colville, for the plaintiff.
S. C. Smoke and G. A. Payne, for the defendants.

March 15. STREET, J.:—In the year 1834, an order of the quarter sessions was made under 50 Geo. III. ch. 1, for the opening of a highway from the township of Percy through several lots and across several concessions in the township of Seymour. One of the lots crossed by the description of the highway was the north half of 3 in the 4th concession of Seymour, the title to which was still in the Crown, although it had been recently occupied under a location ticket or license from

the Crown. The road described in the order of the sessions was never opened, as I find upon the evidence, but another road following the same general direction, but at a distance varying upon this lot from 60 rods to 2 or 3 rods, was opened across this lot and across the other lots mentioned in the order, in or about the year 1835 or 1836. This road was cut out and opened across the north half of lot 3 in the 4th concession of Seymour by John Fraser, the locatee of the lot under the Crown, and members of his family. It was fenced on the south side shortly after it was opened, and upon the north side about the year 1865, by members of the family of the locatee, assisted by their tenant, Benjamin Clute.

The road from the time it was opened was regularly travelled and used as the highway to and from grist and saw mills in the township of Percy to the south-west of the lot in question, and at Campbellford to the north-east. John Fraser, the locatee of the Crown, and his descendants, have lived upon the lot in question from the year 1835 to the present time, clearing and cultivating it. They, as well as their neighbours, have done statute labour on the road for upwards of 40 years; the mails have for many years been carried to and from Campbellford along it; money has been granted by the township for its improvement during the years 1900, 1902, and 1903. In 1900 or 1901 the road through the lot in question was regularly graded, ditched, and partly gravelled, the Frasers assisting in the work. During all this time the title remained in the Crown; on the 23th June, 1904, however, the plaintiff, Charles Fraser, claiming as the successor in title to John Fraser, the original locatee, established his right to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road is made. Shortly after receiving his patent, the plaintiff put a fence across the road at each extremity of his lot, and put up notices forbidding the public to use it and claiming it to be his private property. The township council passed a resolution thereupon, authorising the defendant, the reeve of the township, to remove the fences, which he did, and the present action is brought against him for the alleged trespass committed by him in doing so.

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In my opinion, the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the obstructions and travel upon the road, and is not liable in trespass for having done so.

The plaintiff's contention was that the defendant had shewn no dedication by the Crown, and that the acts of the locatee before the patent were not binding upon him after the issue of the patent; that the origin of the road being shewn to be under the order of the sessions, evidence of user by the public could not be received as evidence of dedication; and that the order of the sessions was not binding upon the Crown.

I think that the road as laid out by the sessions appears to have been found unsuitable; at all events that order was not acted upon, but the present road was laid out upon a different line instead of the one contemplated by the sessions. The whole neighbourhood seems to have concurred in the change, and from the time it was laid out, between 60 and 70 years ago, it has been a recognized, well-travelled public highway connecting locally important centres, fenced off from the farm in question, improved from time to time by statute labour and public money, and treated by the plaintiff and his predecessors in the equitable title to the farm as being an undoubted public highway. Under these circumstances, in my opinion, there is evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a sessions order was made for the establishing of a highway, but never acted upon and abandoned at once, is no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication.

I have referred to the cases of *Regina v. Wismer* (1850), 6 U.C.R. 293; *Regina v. Plunkett* (1862), 21 U.C.R. 536; *Rex v. Sanderson* (1833), 3 O.S. 103; *Regina v. Great Western R.W.Co.* (1872), 32 U.C.R. 506, 517; *Rae v. Trim* (1880), 27 Gr. 374; *Beveridge v. Creelman* (1877), 42 U.C.R. 29.

In *Turner v. Walsh* (1881), 6 App. Cas. 636, which is a decision of the Privy Council later in date than any of the above cases, and is an appeal from one of the Australian Colonies, it

is broadly laid down that from long continued user of a way by the public of Crown land, dedication from the Crown, in the absence of anything to rebut the presumption, may, and ought to, be presumed, following in this respect *Regina v. The Inhabitants of East Mark* (1848), 11 Q.B. 877. These cases are cited and followed in *Regina v. Moss* (1896), 26 S.C.R. 322.

In my opinion, this action must be dismissed with costs.

E. B. B.

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[IN THE COURT OF APPEAL.]

RE NORTH YORK PROVINCIAL ELECTION.

KENNEDY V. DAVIS.

C.A
1905
March 17.

Parliamentary Elections—Judgment Voiding Election—Dissolution of Legislature—Effect on Pending Appeal—Costs.

Where, after an appeal from the judgment of the trial Judges voiding the election of the respondent had been argued, and while it was standing for judgment, the Legislative Assembly was dissolved :—
Held, that the Court of Appeal could make no order, as to costs or otherwise.

AFTER an appeal by Davis, the member elect, from the judgment of the rota Judges at the trial voiding his election had been argued, and before judgment had been given thereon, the Legislative Assembly was dissolved.

On the 23rd January, 1905, the parties were heard by the Court (MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A.), as to the effect of the dissolution.

S. B. Woods, for the petitioner, the respondent upon the appeal, argued that the effect of the dissolution was that the appeal could not be proceeded with, and the judgment of the trial Judges stood unaffected.

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A. B. Aylesworth, K.C., for the appellant, contended that the appeal was but a step in the cause, and that the petition and all the proceedings dropped by force of the dissolution.

March 17. The judgment of the Court was delivered by OSLER, J.A. :—Appeal by the respondent from the certificate and judgment of the trial Judges. After this appeal had been heard, and while it was standing for judgment, the House was dissolved.

Upon the authorities it seems clear that no effective judgment can now be given upon the petition either by dismissing it or by unseating the respondent. The dissolution brought the whole of the proceedings to an end before any final judgment had been pronounced therein. Were we to allow the appeal, there is nothing which we could certify to the House to which the respondent had been elected, and the case is the same were we to dismiss it. I have considered whether the case is one in which we could, or ought to, give judgment *nunc pro tunc* as of the day on which we reserved judgment, and thus pronounce a judgment in which we might dispose of the costs of the appeal; but, on reflection, this course is not open to us. To justify us in doing that, our judgment should be one in its nature effective for some purpose in relation to the relief sought by the petition.

On the whole, therefore, I think we should simply make no order.

T. T. R.

[IN CHAMBERS.]

MOLSONS BANK V. STEARNS.

1905

March 18.

Court of Appeal—Leave to Appeal from Judgment at Trial.

It is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance.

Leave to appeal direct from the judgment at the trial to the Court of Appeal granted, in the circumstances of this case.

MOTION by the defendant for leave to appeal direct to the Court of Appeal from the judgment at the trial, passing over a Divisional Court.

The motion was heard by OSLER, J.A., in Chambers, on the 11th March, 1905.

W. E. Middleton, for the defendant.

C. S. MacInnes, for the plaintiffs.

March 18. OSLER, J.A.:—The amount involved is \$5,000. The defendant asserts an intention to appeal to the Court of Appeal if he is obliged to go to a Divisional Court and fails there. The question involved may be said to be a mixed question of law and fact, and the case is one in which an appeal to the Supreme Court of Canada would lie.

I have read the notes of the decided cases on this point. Each seems to stand on its own circumstances.

My own view is, that it is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance; and that leave ought to be granted here.

Costs in the cause to both parties.

E. B. B

[IN CHAMBERS.].

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ADAMS V. COX ET AL.

March 13.

Interest—Moneys Made under Execution—Reversal of Judgment—Liability to Refund—Rate of Interest—Payment into Court.

Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he became liable to repay it to the defendant. The money, however, was claimed by another execution creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest:—

Held, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into Court or obtaining a waiver of the right to interest; and the interest should be at the legal rate of 5 per cent., for the same reason.

THE plaintiffs having recovered a judgment against the defendants, which was affirmed by the Court of Appeal, issued execution against the defendants, and received from the sheriff as made thereunder a sum of \$1,358.89, being the proceeds of the sale of goods of the defendant Alice R. Cox.

The Supreme Court of Canada on the 14th December, 1904, reversed the judgment of the Court of Appeal (see *Cox v. Adams*, 35 S.C.R. 393), and the plaintiff thereupon became liable to repay the \$1,358.89.

Some delay arose about this, as the money was claimed by another execution creditor. The plaintiff thereupon notified the claimants that he would apply for an interpleader order, and prepared the necessary material, but did not proceed further.

Ultimately on the 20th February, 1905, the money was paid by consent of all parties to the solicitors for the defendants, but without interest, though interest was asked for before payment of the principal.

The defendant Alice R. Cox moved for an order for payment by the plaintiff of interest at 5 per cent. from the date of payment to the plaintiff to the date of repayment, a period of nearly 11 months.

The motion was heard by the Master in Chambers, on the 10th March, 1905.

J. Bicknell, K.C., for the applicant.

J. J. MacLennan, for the plaintiff.

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MARCH 13. THE MASTER IN CHAMBERS:—The *prima facie* right to interest, in the circumstances of this case, is established by *Rodger v. Comptoir d'Escompte de Paris* (1871), L.R. 3 P.C. 465, where the whole question is discussed by Lord Cairns.

This was followed by Bacon, V.-C., in *Merchant Banking Co. v. Maud* (1874), L.R. 18 Eq. 659, and by our own Court of Appeal in *Sherk v. Evans* (1895), 22 A.R. 242 (see especially judgment of Osler, J.A., at p. 248).

Counsel for the plaintiff, however, contended that, in view of the conflict as to who was entitled to the principal, interest should not be allowed. But it was open to him to have guarded himself either by an order to pay the money into Court, or by getting a waiver of any right to interest from the rival claimants. Unfortunately he did not adopt either of these necessary and yet simple precautions.

Then there was a further objection to the rate of interest asked for. It was argued that if the money had been paid into Court it would only have borne interest at 3 per cent. The answer to this is the same as to the objection that no interest should be allowed. A further answer would be that the plaintiff might have put the money on special deposit with the consent of the claimants, if the expense of payment into and out of Court was to be avoided. Then no question could have been raised either as to the right to interest or to the rate.

The present lawful rate being 5 per cent., I think the defendant Alice R. Cox is entitled to what she asks.

In the whole circumstances, I do not make any order as to costs, if the plaintiff withdraws his claim for any costs of the contemplated motion for an interpleader order. These may well be set off one against the other.

T. T. R.

[DIVISIONAL COURT.]

IN RE WILSON V. MCGINNIS.

D. C.

1905

June 21.
Sept. 22.*Division Courts—Service of Summons.*

Except in the few special cases provided for by the Division Courts Act the bailiffs of the courts have the right to serve summonses, and a plaintiff is not entitled as of right to effect service himself.

Mandamus to a division court clerk to compel him to give a summons to the applicants for service refused.

MOTION for mandamus to the clerk of the 5th division court in the county of Victoria, argued in Chambers on the 16th of June, 1905, before MAGEE, J., in whose judgment the point involved is set out.

W. H. Blake, K.C., for the applicants.

No one contra.

June 21. MAGEE, J.:—The applicants have entered an action in the 5th division court in the county of Victoria against one McGinnis, and ask a mandamus to the clerk of that court to compel him to deliver the summons and copy to the plaintiffs to have it served instead of delivering it to the bailiff of the court for service. The clerk, acting under advice of the inspector of division courts, has declined to do so on the ground that the bailiff is the proper officer to make the service, unless some one else be specially authorized in accordance with the Division Courts Act. The application is made on notice to the clerk, but no one has appeared for him.

The applicants claim the same right as is accorded to plaintiffs in the High Court and county courts. No authority is cited in support of the motion and it is said that the question has not been decided.

A perusal of the Division Courts Act, R.S.O. 1897, ch. 60, and the Rules and Forms thereunder, leads me to the conclusion that it was not intended that plaintiffs in those courts should have the right contended for.

Under secs. 98 and 99 the plaintiff enters his claim with the clerk and by sec. 44 the clerk shall issue all summonses and furnish copies.

Then by sec. 54 (the origin of which I will refer to) the bailiffs shall serve and execute all summonses, orders, warrants and writs delivered to them by the clerk for service, whether bailiffs of the court out of which the same issued or not, and so soon as served return the same to the clerk but (subject to sec. 85) are not required to go outside the division nor allowed mileage outside the county.

Sec. 85 apparently contemplates service by a bailiff, for it declares it sufficient if made by one from the adjoining county.

Sec. 87, referring to service out of the Province, allows it to be made by a bailiff or some competent person approved by the judge or clerk and the affidavit of service sworn as therein provided shall be as effectual as if made by a bailiff before the clerk.

Sec. 96 requires the clerk of another division court to whom the summons is sent to hand it to the bailiff.

Sec. 107 provides for the case of there being no bailiff or the bailiff being suspended or for the summons being required to be served outside of the division and allows service by such other bailiff or person as the Judge or clerk orders. The case of illness or temporary incapacity is not covered by this section, possibly in view of sec. 35, which allows the bailiff in such cases to appoint a deputy.

By sec. 109 the clerk prepares the affidavit of service which shall state the distance the bailiff has travelled, and the form (No. 28) of affidavit given by the rules is for a bailiff and the clerk is directed that it must not be prepared in a perfunctory way.

Rules 190 and 191 provide for the bailiff returning the summons to the clerk for necessary changes if not served in time. No such provision is made for return by any one else.

Then in the case of subpoenas for witnesses special provision is made by sec. 138 for service by any literate person.

The absence of any provision for allowing or disallowing to a plaintiff the costs of service otherwise than by a bailiff is at least not an indication that such expense was contemplated.

Rule 152 requires the clerk to keep all papers with the original summons and to produce them.

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Rule 155 requires the clerk to prepare lists of cases for trial. This he could not do if the plaintiff had the summons.

I have referred to the Act as it stands, but when the origin of sec. 54 is looked into the intention becomes clear. The Division Courts were established by 4 & 5 Vict. ch. 3, which, by sec. 10, directed that "the bailiffs of the court shall serve all summonses." This was re-enacted in 13 & 14 Vict. ch. 53, sec. 13, and by sec. 87 of this latter statute service outside of the division might be made by any other bailiff in Upper Canada and would be as valid as if made by the bailiff of the division and within the division. By 16 Vict. ch. 177, sec. 29, a new section was substituted for sec. 87, limiting such service to a bailiff of the county instead of Upper Canada. Then by 18 Vict. ch. 125, sec. 52, the bailiff of any division was authorized and required to serve and execute process delivered to him for service or execution although from another division, but he was not required to travel outside of his own division nor allowed mileage beyond his county.

On the consolidation of the statutes in 1859 these provisions of 13 & 14 Vict. ch. 53, sec. 13, 16 Vict. ch. 177, sec. 29, and 18 Vict. ch. 125, sec. 52, were combined—perhaps not happily—in sec. 79 of the Act respecting division courts (C.S.U.C. ch. 19) which has since remained unaltered, and is now sec. 54, already referred to, of the present Act.

From the various standpoints of despatch, economy and regularity, the practice of having the service made by a bailiff meets the requirements of the public. Various sections of the Act and Rules provide for prompt action by him. He has to furnish security and is subject to oversight by the clerk, the inspector, and the Judge, and is liable to suspension and loss of fees and office. The execution of attachments and writs usually requires even more celerity of action than summonses, and that duty falls to him alone. His fees are small and it would be comparatively seldom that service could be effected and the necessary proof and return made at really less expense to the plaintiffs. The necessity for an adequate income for the officer is not a reason for incurring useless expense, but where the expense is usually really less it may well have been the intention of the Legislature to assure him proper and sufficient

emoluments. In many cases service need not be personal. Much irregularity and even undesirable practice would be very likely to ensue if illiterate or over-reaching and irresponsible persons were allowed so to effect it. That would not be in the interests of those for whom these courts were established. Similarly in the English county courts an "ordinary summons," which does not require personal service, must be served by a bailiff. A "default summons" must be personally served and in that case, if the plaintiff requires it to be served otherwise than by a bailiff, the persons by whom that may be done are restricted. (Order VII., Rules 33, 34, Order V., Rule 9).

Although I have concluded that the plaintiffs are not entitled under the construction of the Act, I may also point out that it is not shewn that McGinnis is within the division. If he is not, then sec. 107 would have given the applicants a cheaper and efficient remedy nearer home.

Then again, under sec. 32, the county Judge, who holds the division courts, has still the responsibility of seeing that the clerks and bailiffs in his county do their duty, although he no longer appoints and removes them as formerly. If the plaintiffs were entitled to have the summons delivered to them they could have applied to the county Judge. It is not to be presumed that the clerk would refuse to obey an order from him. There was, therefore, an adequate remedy at the plaintiffs' own doors. The existence of such a remedy would itself be reason for refusing this application. Whether at least in the absence of even an application to or direction by the Judge a mandamus should issue to a subordinate officer of an inferior tribunal, it is not necessary to consider: see Shortt on Informations, p. 295; *Rex v. Scully* (1901), 2 O.L.R. 315; *Regina v. Fletcher* (1852), 2 E. & B. 279; and *Linden v. Buchanan* (1869), 29 U.C.R. 1.

I may add that the affidavits and notices are improperly intituled as in an action in this Court.

The motion is refused.

An appeal by the applicants was argued before a Divisional Court [MEREDITH, C.J., C.P., ANGLIN, and CLUTE, JJ.] on the 18th of September, and on the 22nd of September, 1905, was dismissed, the Court agreeing with the reasons for judgment above reported.

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[IN THE COURT OF APPEAL.]

C. A.

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June 29.

REX V. MAHER.

Municipal Corporations—By-law Respecting Cab Stands—Cab Waiting for Hire.

A livery stable keeper made an agreement with the proprietors of a hotel to keep at all times three carriages in attendance at the hotel ready for immediate use by guests, each carriage to be deemed as hired by the proprietors, from the time of attendance until dismissed or engaged for use by a guest, at the rate of one cent an hour, and the proprietors made themselves responsible for the payment by guests of the fees properly chargeable :—

Held, that in keeping carriages in attendance pursuant to this agreement the livery stable keeper was not guilty of a breach of a municipal by-law providing that no cab should stand upon any street while waiting for hire or engagement, or while unengaged.

Conviction quashed.

APPEAL by the defendant, under the provisions of the Act respecting appeals on prosecutions to enforce penalties, R.S.O. 1897 ch. 91, sec. 3, as amended by 1 Edw. VII. ch. 12, sec. 11, from the judgment of the chairman of the court of general sessions, the Attorney-General having given the prescribed certificate.

The appellant, a licensed livery stable keeper in the city of Toronto was prosecuted for having contrary to the provisions of city by-law number 4321 caused his cabs to stand on the 22nd of March, 1904, and the 24th of March, 1904, in a street in the city while waiting for hire or engagement, the place in question not being a stand for cabs. The informations were dismissed by the deputy police magistrate on the 18th of April, 1904, but his decision was reversed by Winchester, Co.J., in the general sessions, on the 6th of February, 1905, and the appellant was convicted on each charge.

The by-law in question is in the following terms: "No cab, cart, express waggon, or other vehicle kept for hire, shall stand upon or in any street while waiting for hire or engagement or while unengaged except upon and on the streets and subject to the regulations hereinafter mentioned."

By the by-law portions of certain streets, where cabs, etc., might stand for hire were specified, and penalties for breaches of the by-law were provided.

The evidence shewed that carriages of the appellant had been standing for some hours on each of the days in question, apparently not in use, in a street near a hotel in the city of Toronto known as the King Edward hotel, and that this was not place where cabs were allowed to stand for hire. There was no evidence that the street had been obstructed or traffic interfered with.

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The defence was that the carriages had in fact been hired by the proprietors of the hotel, and the following agreement between the appellant and the hotel company was proved and relied on: "Agreement made this 29th day of January, 1904, between Patrick Maher of the city of Toronto livery stable keeper of the first part and the King Edward Hotel Company (hereinafter called the company) of the second part. Whereas the said Maher has (in contemplation of making this present agreement) been since the 11th day of May, 1903, furnishing carriages for the use of the guests and customers of the said hotel and has satisfied the said company of his ability to render such service in an efficient and satisfactory manner and is now desirous of making an arrangement for the continuance of such service during a definite period. Now therefore these presents witness that in consideration of the contract now hereby entered into by the said Maher the said company agree to give to the said Maher the exclusive privilege of furnishing vehicles for the use and accommodation of guests and customers of the said hotel, but not including omnibuses for the carriage of guests between the hotel and railways or steamboats, and excepting in any case when a customer or guest of the hotel may desire and direct any vehicle to be called or ordered from a livery stable keeper of his own selection, and it is agreed that in any such case the vehicle so ordered shall not be considered as furnished to or for the said company nor under their order or direction. And it is agreed that the said exclusive privilege shall continue for five years from the said 11th day of May, 1903, provided the said Maher his executors administrators or assigns continue to render such service in an efficient and satisfactory manner and subject and reserving to the said company the right to determine the same by ten days' notice in writing in case the service be performed in a manner which

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they shall deem inefficient or unsatisfactory and such inefficiency or unsatisfactory performance be not promptly remedied or amended upon any complaint being made regarding the same and notified by the company to the said Maher. In consideration whereof the said Maher agrees with the said company that he will from time to time and at all times during the period aforesaid furnish all vehicles which shall be required by the guests of the hotel for ordinary use in driving in and about the city of Toronto, and that such vehicles shall at all times be kept in the best condition in a thorough state of repair and cleanliness and equipped with cushions, rugs and robes and all such furniture and appliances as shall be usual in properly appointed vehicles of the kind, with suitable horses sound and in good condition properly groomed and equipped and harnessed in the best manner; and every vehicle to be accompanied by one servant properly dressed in plain livery and to be strictly clean and neat in dress and person and every servant so employed shall be required to be an efficient coachman and have a good knowledge of the city of Toronto and neighbourhood and be at all times prompt and attentive in the performance of his duties and in the performance of the reasonable orders or requirements of the persons using the vehicle to which he is attached. The said Maher shall keep at all times at least three carriages in attendance at the hotel ready for immediate use when required, every such carriage to be deemed as hired by the company at a charge to be paid by them of one cent per hour from the time it shall be in attendance at the hotel until discharged therefrom or engaged for use. The responsibility of the said Maher to furnish carriages shall not be limited to the said three carriages so constantly engaged but he shall furnish whatever carriages may be reasonably required at any time by the said company for their customers or guests promptly upon same being called for. The said hotel company shall be responsible to the said Maher for the charges payable to him for carriages used by guests or customers of the hotel engaged or ordered by or through the clerks or servants of the hotel or taken up at the hotel such charges to be at the rates which are or shall from time to time be fixed by the by-laws of the said city of Toronto and no person using any carriage furnished

pursuant to this agreement shall be charged or required to pay any other or greater charges than those fixed by the said by-laws, except in the case of any service being required and performed not within the scope of such by-laws or not thereby provided for, in which case the charges shall not be greater than the said company shall deem reasonable. In witness, etc."

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The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 31st of May, 1905.

George T. Blackstock, for the appellant. The decision of the deputy police magistrate was right and should not have been reversed by the learned Judge of the county court. There has been no breach of the city by-law. The defendant's cabs were not standing in the street unengaged or for hire. The agreement is plain and under it there was an actual hiring of the cabs in question during the whole time they were in waiting at the hotel. It is not essential that the cabs should have been in actual use. If they were hired or engaged the by-law was complied with and it is quite immaterial whether they were used or not. There is no question as to the good faith of the agreement, and the object to be attained by it is a very plain and reasonable one, so that the smallness of the amount of the payment to be made by the hotel company to the defendant is of no importance. The main consideration to the defendant no doubt was the exclusive right to supply cabs. The reasoning in the similar case of *Willard Hotel Company v. District of Columbia* (1904), 23 App. D.C. 272, applies directly to this case and is unanswerable. See also *Case v. Storey* (1869), 17 W.R. 802.

William Johnston, for the prosecutor. The agreement was made simply for the purpose of trying to evade the provisions of the by-law and should not be given effect to. There was no actual engagement of the cabs and they were waiting at the hotel for use by guests when required, and were therefore standing in the street unengaged. The case of *Willard Hotel Company v. District of Columbia* is quite different in its facts, for there the hotel company were really lessces of the cabs, the

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money for the use of the cabs being collected by them and profit being derived by them from the transaction.

Blackstock did not reply.

June 29. OSLER, J.A. :—I have had an opportunity of reading the judgment of my brother Maclellan and agree with what he has said. I think deputy police magistrate Kingsford took the right view of the case. There was a valid contract between the hotel company and the defendant under which his carriages were lawfully engaged by the company and were therefore so long as they were not obstructing the street, as the learned magistrate points out, lawfully standing in front of the hotel. This was no violation of the by-law for such cabs were furnished to or for the company who became liable to the appellant to pay the substantial charges for them as soon as they were used by the guests of the hotel just as if they had been contracted to be supplied ready to be used when wanted by the clerks or officials of the company itself. The attention of the learned chairman of the sessions was probably too exclusively directed to the nominal consideration of the agreement as if it was indicative of an intention to evade the provisions of the by-law, instead of to the question whether the contract was—as in fact it undoubtedly was—an engagement to supply the carriages, etc., and whether they were so supplied. If they were, they were not “unengaged” which is the language of the by-law, and open to be hired by any one who chose to employ them and might lawfully stand where they did if no obstruction of the street was thereby occasioned. *Canadian Pacific R.W. Co. v. City of Toronto* (1902), 1 O.W.R. 255, and *Dunn v. Holt* (1904), 20 Cox C.C. 625, may be referred to. I have considered *Allen v. Tunbridge* (1871), L.R. 6 C.P. 481, and similar cases, but the language of the contract in question here, if there were nothing else, makes them inapplicable.

I would allow the appeal.

MACLELLAN, J.A. (after stating the facts):—This agreement has been acted upon. As an illustration of its operation one of the drivers says he was summoned from the stables to the hotel, and drove a party of guests to the theatre. He then drove back to the hotel, stood in the street in front of the entrance

until the theatre was out, drove there, and brought the party back to the hotel. He refuses to be engaged by any but hotel guests while standing there.

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MacLennan,
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Now it cannot be denied that the company could summon a cab either from a livery stable or a cab-stand for the use of a guest or guests and that such a cab might stand for a reasonable time until the guest was ready, without violating the by-law. I think it is common knowledge that a great hotel constantly orders carriages for its guests, and that in the case of a great hotel this must be a necessary and important part of its business. It might have a livery stable and horses and carriages of its own, and if so why might it not have as many as three carriages constantly at its door if the business required it. It could not do that if the public use of the street was thereby unreasonably obstructed; and if, instead of having stables and horses and vehicles of its own, it makes such an agreement as the present with a livery keeper, its rights and the limitations thereof must be the same. While standing at the door the defendant is already engaged, he is not waiting to be engaged or hired, or unengaged within the meaning of the by-law, notwithstanding the merely nominal consideration, while merely waiting. I think a doctor, or other person having frequent use for a vehicle, at uncertain times, might make a similar agreement with a cabman without the latter being exposed to the penalty of the by-law. It would be simply a question of making a reasonable use of the street.

The case of *Attorney-General v. Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276, illustrates the law applicable to this case. In that case the defendants did a very large business in a very narrow street only twenty feet wide, loading and unloading as many as six vans at a time, and it was held to be in each case a question of degree whether the exercise of the private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable.

I think the appeal should be allowed, and the conviction set aside with costs here and below.

MOSS, C.J.O., GARROW, and MACLAREN, J.J.A., concurred.

R.S.C.

[DIVISIONAL COURT.]

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v.

May 5.
May 29.
June 22.

LOCAL UNION No. 30, AMALGAMATED SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION ET AL.

Attachment of Debts—Moneys of Union—Representative Action—Judgment for Costs Against Representatives—Effect of—Non-liability of Union—Garnishment.

In an action against a union, in which certain members of it had been by an order of Court authorized, besides representing themselves, to defend the action on behalf of and for the benefit of all other persons constituting the union, and were to be bound by the judgment and proceedings therein, certain costs were ordered by the Court of Appeal to "be paid by the respondents to the appellants," the respondents being the representative members:—

Held, that although all the members of the union might possibly be bound by the judgment to be ultimately pronounced, an order that the defendants, respondents, should pay money whether for damages or costs, without more, could not be enforced by execution or process against the property of the union or members thereof not named as defendants, and that moneys in a bank to the credit of the union and three of its officers could not be garnished.

Judgment of Anglin, J., reversed.

THIS was an appeal from the judgment of ANGLIN, J., on an appeal from a judgment of the Master in Chambers on an application by the plaintiffs for an order for payment over of moneys in a bank standing to the credit of the defendants, "The Amalgamated Sheet Metal Workers' Union No. 30; Alex. Kay, president, W. C. Brake, recording secretary, and R. Russell, treasurer," and to the credit of the defendant William Jose.

The motion in Chambers was argued on the 27th of April, 1905, before the Master in Chambers.

W. N. Tilley, for the plaintiffs.

J. G. O'Donoghue, for the defendants.

W. B. Milliken, for the garnishees.

May 5. THE MASTER IN CHAMBERS:—The facts of this case so far as relevant to this motion are set out in the judgment of the Court of Appeal, 9 O.L.R. 171.

The certificate of that judgment directed certain costs to be paid by and to the respondents and appellants, with set-off and balance only to be paid to the parties entitled.

The taxing officer has certified that \$146 is the balance due by the defendants to the plaintiffs.

An execution for this balance was placed in the hands of the sheriff but remains unsatisfied.

On 20th of April the plaintiffs obtained an attaching order on all moneys of the Union, or of the individual defendants in the Dominion Bank.

Counsel for the garnishees, the Dominion Bank, admitted \$20 in their hands to the credit of William Jose, and \$409.85 to the credit of an account headed "The Amalgamated Sheet Metal Workers' Union No. 30," which moneys are payable out on cheques, signed by Alex. Kay, president, W. C. Brake, recording secretary, and R. Russell, treasurer.

It was admitted that the \$20 to the credit of Jose must be paid to the plaintiffs.

As to the other sum, it was argued that the order of the 5th of October, 1903, was representative only; and that there was no order for these costs against the Local Union.

On the other side, reliance was placed on the terms of the above order and of the certificate of the Court of Appeal.

The point was admitted by both counsel to be new, and neither of them cited any authorities.

The result of the judgment of the Court of Appeal would seem to be that Local Union No. 30 is not "an entity known to the law." Counsel agreed before me that its name should not appear as a party to the litigation.

Not being a legal entity, it cannot hold property, and the money standing in the Dominion Bank is not the property of the Union. It rather belongs to those who, from time to time, are entitled to share in what is really a trust fund for securing the payment of certain sums for relief in cases of sickness, or of the death of those who are members of the voluntary association, known as Local Union No. 30.

The money paid into this fund ceases at once to be the property of the contributors. They have no longer any individual power to deal with it in any way. It has passed out of

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their control, and is, therefore, not assignable by them, nor can it be attached to satisfy their debts.

The Court of Appeal has decided that the two voluntary associations cannot be made parties to an action. They can only be reached in the way of the order made by Mr. Justice MacMahon. Whether such an order will bind the other members of the association, so as to render them liable for costs, is a matter which may have to be considered later on. How it will be decided is by no means clear.

At present, it is sufficient to say that the funds in question are not shewn to be exigible to satisfy plaintiffs' execution for costs.

Before an order of this kind can be made absolute, it must be shewn beyond any reasonable doubt, that the money is properly exigible to satisfy the plaintiffs' judgment.

But this is far from being established in the present case, and, therefore, as to the larger sum, the motion must be dismissed and the order discharged.

As the plaintiffs have had some measure of success, and as the point on the other branch is new, there will be no order as to costs, except that those of the garnishees fixed at \$7 will be paid by the plaintiffs.

Reference to the following may be useful: *Kingston v. The Salvation Army* (1903), 6 O.L.R. 406, affirmed (1904), 7 O.L.R. 681, and *Aikins v. Dominion Live Stock Association* (1896), 17 P.R. 303, which contains a very full discussion of the nature of such unincorporated bodies, and a review of the English cases as to the way in which they can be reached.

From this judgment the plaintiffs appealed to a Judge in Chambers, and the appeal was argued on the 26th of May, 1905, before ANGLIN, J.

Strachan Johnston, for the appeal.

J. G. O'Donoghue, contra.

May 29. ANGLIN, J. :—The plaintiffs appeal from an order of the Master in Chambers, dismissing a motion to attach a sum of \$409.85 held by the Dominion Bank, garnishees, to the credit of "The Amalgamated Sheet Metal Workers' Union No.

30; Alex. Kay, president, W. C. Brake, recording secretary, and R. Russell, treasurer."

Affirming an order of a Divisional Court (5 O.L.R. 424), the Court of Appeal held that, as an unincorporated, unregistered, voluntary association, not formed for any purpose of gain or profit, "Local Union No. 30, Amalgamated Sheet Metal Workers' International Association," is an entity unknown to the law, and that its members cannot be sued by their adopted name (9 O.L.R. 171). The right to proceed against the members of such a body in a representative action was in the same judgment authoritatively declared.

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By order of Boyd, C., made on the 6th March, 1903, by consent, subject to a question of jurisdiction, which was expressly left open, certain individual defendants, made parties by an earlier order, were authorized to defend this action on behalf of all other persons constituting Local Union No. 30, A.I.A., and of all other persons constituting the International Association, and it was also ordered that all such other persons should be bound by the proceedings in this action. The style of cause was amended to meet the requirements of this order. From that time the individual defendants were before the Court in their representative capacity.

Upon the question of jurisdiction to pronounce the order of 6th March coming before him, MacMahon, J., held that the Court had such jurisdiction as to the Local Union No. 30, A.I.A., but had not as to the American parent body, the A.I.A. itself.

On appeal from this order, the Court of Appeal declared that jurisdiction existed as to both the Local Union and the parent association (9 O.L.R. 171).

By the certificate of the judgment of that Court it was ordered that the costs of the appeal from the order of MacMahon, J., "be paid by the respondents to the appellants." These costs, after deducting certain sums set off by agreement of the parties, amount to \$146.66. An order attaching \$20 standing to the credit of one of the individual defendants, William Jose, has already been granted.

For the appellants, it is contended that by virtue of the order for representation, all the members of Local Union No. 30, A.I.A., are bound by the order of the Court of Appeal for payment of

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the costs which "the respondents" were ordered to pay; and that the money standing to the credit of Local Union No. 30 is, in fact, the property of those who are so ordered to make payment.

Upon examining the certificate of the judgment of the Court of Appeal, I find that "the respondents" are, amongst others, "William Jose, Richard Russell, S. Cox, W. C. Brake, J. S. Chapman, J. H. Kennedy, and Jas. Gow, on behalf of themselves and all other persons constituting the said Local Union No. 30, A.I.A." The appeal of which they were ordered to pay the costs is in this certificate termed "the cross appeal of the respondents." The order for representation was not itself in appeal. What would be the effect of the Court of Appeal judgment, if pronounced upon an appeal from that order, upon the liability for these costs of members of the Local Union, other than those named as defendants, may be open to some question. But representation having been provided for by the order of the Chancellor, it follows, that in all subsequent proceedings the named defendants appeared in their representative as well as their individual characters. Under the certificate of the judgment of the Court of Appeal, it is, in my opinion, clear that liability for the plaintiffs' costs is imposed, not only upon the named defendants, but also upon all those whom they represent in this action.

In his written opinion the learned Master says that the fund held by the garnishees is really a trust fund, not the property of the contributors, not under their control, not assignable by them, and therefore not attachable to satisfy their debts. I find nothing in the material before me, consisting of affidavits of W. N. Tilley, C. A. Ross, J. H. Horsey and Arthur Peplar and exhibits in these affidavits, referred to, which supports a finding that the fund in question is impressed with any trust, unless it be that the persons upon whose signatures it is withdrawable should be deemed to hold it as trustees for their fellow members in the local union. The constitution of the Amalgamated Sheet Metal Workers' International Alliance, which counsel for the judgment debtors handed in upon the argument, does not appear to have been properly in evidence below, and should not, I think, be now admitted. But, if received, it would shew that

"The funds or property of the Local Union cannot be divided in any manner among the members individually, but shall remain the funds and property of the Local Union for all legitimate purposes while seven members remain therein." (Article VI. sec. 3.) This would seem to make it reasonably clear that the money in question is the property of the Local Union No. 30, using that name to designate collectively the members composing this branch of the International Association. If the funds of the Union, that is of the members collectively, were vested in trustees, upon adding them as parties, the Court could reach such funds for payment of damages and costs. Such is Lord Lindley's view expressed in *The Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants*, [1901] A.C. 426, at p. 443. If this Local Union could be sued in its own name, I should have no doubt that a judgment obtained against it might be enforced against this fund: (See language of Lord Macnaghten, S.C. at p. 437.) Because unincorporated it may not be so sued; and, while in substance this action is against the Union, in form it is necessarily brought against the individuals who are its members. But the same facts which protect it from suit render this body incapable of holding property. It follows that what stands in its name is the joint property of the individual members and as such it is in my opinion exigible for their debt to the plaintiffs.

The appeal will therefore be allowed with costs here and below.

From this judgment, the defendants, the Local Union No. 30, appealed to a Divisional Court, and the appeal was argued on the 5th and 6th of June, 1905, before MEREDITH, C.J., C.P., BRITTON and TEETZEL, JJ.

J. G. O'Donoghue, and *T. J. W. O'Connor* for the appeal. The Local Union is not a party to the action. It is not even an entity known to the law. That was the effect of the judgment of the Court of Appeal (1905), 9 O.L.R. 171. It may be that this is a representative action, the defendants representing the members of the Union for certain purposes in the action, but not to such an extent as to risk our money and have it taken away from us for

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these costs. The Union is in the same position as a club. Its membership fluctuates. New members have joined and old members have gone out since the representative order was made. An order for costs against some only of the members cannot be forced against their property rights in the Union. No member could demand his share—his judgment creditor is in no better position. An unincorporated body can own property, e.g. the Inns of Court in England: see Pollock on Torts, 3rd ed. 110. Local Union No. 30, though it cannot be served with the process of the Court, owns this fund, and no order for costs has been made against the Union.

Strachan Johnston, contra. Although the Court of Appeal may have held that the Local Union is not "an entity known to the law," still it must be an entity in some sense, as it is a body acting in concert. The order appointing the individual members made the proceedings binding on "all other persons constituting Local Union No. 30." That cannot be restricted to those members only, who were members at any particular stated time. The Union as constituted is liable as a body for the costs in question: *Commissioners of Sewers of the City of London v. Gellatly* (1876), 3 Ch.D. 610. The moneys stand in the bank to the credit of the Union, payable out on the signatures of certain officers, and so are vested in the Union. The English Trades Union Statutes do not refer to actions of tort, but only to actions relating to property, therefore leaving actions of tort where they were before these statutes were passed, and so *Linaker v. Pilcher* (1901), 84 L.T.N.S. 421, is an authority that under the circumstances in this case the funds of the Union are liable.

T. J. W. O'Connor, in reply.

June 22. MEREDITH, C.J.:—This is an appeal from an order of Anglin, J., dated 29th of May, 1905, reversing an order of the Master in Chambers, dated 12th of May, 1905, in so far as it dismissed the respondent's motion seeking to attach certain moneys in the hands of the garnishees standing at the credit of Local Union No. 30, Amalgamated Sheet Metal Workers' International Association.

The aspect of the case, as presented before us, differs from

that which the case bore, when it came before my brother Anglin on appeal from the order of the Master in Chambers, owing to the consent of the respondents' counsel to its being dealt with as if the name of the association as a defendant were omitted from the style of the cause in the certificate of the Court of Appeal, dated the 23rd of January, 1905, under the provisions of which the costs which constitute the judgment debt were ordered to be paid.

The respondents to the appeal who were ordered to pay these costs, are, therefore, to be treated as thus described in the style of the cause, viz.: "The Amalgamated Sheet Metal Workers' International Association and William Jose, Richard Russell, S. Cox, W. C. Brake, J. S. Chapman, J. H. Kennedy, J. S. Annable and James Gow, on behalf of themselves and all other persons, constituting Local Union No. 30, Amalgamated Sheet Metal Workers' Association and the said Amalgamated Sheet Metal Workers' International Association."

By an order, made by my brother MacMahon, dated the 5th of October, 1903, it was ordered that the individual defendants "shall, for the purpose of this action, besides representing themselves represent, and they are hereby authorized to defend this action on behalf of and for the benefit of all other persons constituting Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, and that all such other persons shall be bound by the judgment and proceedings herein."

We are not called upon, in determining the questions raised upon this appeal, to consider whether, if the respondents are successful in their action and are awarded damages and costs, the Court may not by its judgment provide that the property of Local Union No. 30 may be made available for the satisfaction of the judgment debt and costs; the sole question for decision being whether moneys owed by the garnishees to the Local Union may be attached to answer the liability of the respondents in the appeal to the Court of Appeal for costs to which the appellants therein are entitled by the certificate of that Court.

I am unable to see how that question can be answered otherwise than in the negative.

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The members of the Local Union, other than those named as defendants, are not parties to the action; they are represented, no doubt, by the members who are defendants, and will be bound by whatever judgment may be ultimately pronounced, as if they had been named as parties defendants, and, as I have said, that being the case, the Court may be enabled to pronounce a judgment, which will render the property of the Local Union answerable for the judgment debt and costs, if the respondents shall succeed in the action; but I am unable to understand how A., B. and C. being defendants, and an order having been made that they shall represent all the other members of a class, an order that the defendants shall pay money, whether it be for damages or costs, without more, can be enforced by execution or process in the nature of execution against the property of any one but A., B. and C., in other words, how an order that A., B. and C. shall pay money, can be treated as an order that they and the other members of a class for which they have been authorized to defend, shall pay it.

On this short ground, I am of opinion that the order appealed from must be reversed, and the order of the Master in Chambers restored.

I refer to *Watson v. Cave* (No. 1), (1881), 17 Ch. D. 19; *Fraser v. Cooper, Hall & Co.* (1882), 21 Ch. D. 718; *May v. Newton* (1887), 34 Ch. D. 347, at p. 349; *Daniell's Chancery Practice*, 7th ed., pp. 172, 229 and 1042.

It is not a case for awarding costs to either party of this appeal or of the appeal to my brother Anglin.

BRITTON and TEETZEL, JJ., concurred.

G. A. B.

[ANGLIN, J.]

REX V. BANK OF MONTREAL.

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Feb. 1.

Bills of Exchange—Forged Cheques—Crown—Forgeries by Clerk in Government Department—Payment by Bank—Negligence—Pass-book—Duty of Customer to Check Accounts—Settlement of Accounts—Audit Act—Estoppel—Laches—Deposit of Cheques in other Banks—Liability over—Duty of Knowing Customer's Signature—Alteration in Position—Mistake—Liability as between two Innocent Parties.

A clerk in one of the departments of the Dominion government forged several cheques upon the bank account kept by the department with the defendants, in the manner set out in the judgment, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book.

In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's account, the defendants contended that the right to recover was barred by the omission or neglect by officers of the government of duties which the ordinary customer owes to his bank:—

Held, upon the evidence, that there was no negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission.

2. That there is no contractual obligation on the part of the banker's customer to examine his pass-book; nor in this case was the passing of the book to and fro evidence of a stated and settled account, for the account was "a letter of credit" account, and the settlements between the Crown and the defendants were made by means of reimbursement cheques, pursuant to sec. 30 of the Audit Act, and the reimbursement cheques accepted by the defendants did not cover the forgeries.

3. But, if there was a breach of duty or negligence or omission, it would not avail the defendants, for the Crown is not bound by estoppel, nor responsible for the negligence or laches of its servants.

4. The claim of the defendants against the other banks with which the forged cheques were deposited was based upon liability as indorsers, or upon warranty or representation that the cheques were genuine, or upon payment and receipt of the proceeds of the forgeries under mistake of fact:—

Held, upon the evidence, that the third party banks were not indorsers, and that there was no implication of warranty or representation upon which a claim for indemnity could be founded.

5. The rules as to notice established in regard to genuine bills and notes are inapplicable to the case of mere forgeries.

6. The defendants never were acceptors of any of the cheques within the meaning of sec. 54 of the Canadian Bills of Exchange Act.

7. A banker does not owe to the holder of a cheque the duty of knowing his customer's signature.

Imperial Bank of Canada v. Bank of Hamilton, [1903] A.C. 49, applied and followed.

8. But upon the ground of estoppel arising from payment by the defendants of the forged cheques and the change in position of the third parties which ensued, the defendants were not entitled to recover against the third parties.

9. And, apart from the estoppel, the rule that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it, afforded the third parties a defence; for, though they had credited the forger's accounts with the

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amounts of the forged cheques before they were presented for payment, that mistake would have been innocuous to them, had it not been for the subsequent mistake of the defendants in honouring those cheques; and this act of the defendants was the proximate cause which enabled the forger to reap the benefit of his frauds.

ACTION to recover \$75,705, the aggregate amount of 12 cheques forged by one Abondeus Martineau, a clerk in the Department of Militia at Ottawa. These cheques were drawn upon the defendants, and were paid by them and charged against the account of the Receiver-General of Canada. The Quebec Bank, the Sovereign Bank, and the Royal Bank, were brought in by the defendants as third parties, and relief over against them claimed, the forged cheques having been each deposited by Martineau in some one or other of these banks at Ottawa, and having been presented for payment to the defendants by or through these banks. The facts are stated in the judgment.

The action was tried before ANGLIN, J., without a jury, at Ottawa, on the 15th, 16th, and 17th December, 1904.

A. B. Aylesworth, K.C., and J. H. Moss, for the plaintiff.
G. F. Shepley, K.C., J. J. Gormully, K.C., and J. F. Orde, for the defendants.

W. R. Riddell, K.C., and R. B. Matheson, for the Quebec Bank.

J. A. Ritchie, for the Sovereign Bank.

G. F. Henderson and A. W. Greene, for the Royal Bank.

February 1. ANGLIN, J.:—This action is brought to recover a sum of \$75,705, the aggregate amount of 12 cheques forged by one Abondeus Martineau, at the time of the forgeries a clerk in the Department of Militia and Defence, and now a convict in the penitentiary at Kingston. These cheques were paid by the defendants and have been charged against the account of the Receiver-General of Canada. Six of them, aggregating \$20,005, made payable to the order of Chas. Côté, a fictitious name assumed by Martineau, were deposited by him with the Quebec Bank, in an account opened in that name, and their proceeds he eventually drew out and lost in stock speculations.

Four other cheques, totalling \$30,200, he made payable to the order of Chas. D. Coté, a pseudonym in which he opened an account with the Sovereign Bank, to the credit of which he deposited these cheques, afterwards drawing out and losing their proceeds in like manner. The remaining two cheques, amounting to \$25,500, were drawn payable to the order of A. Martineau, and were deposited by the forger to his own credit with the Royal Bank. These moneys also appear to have been all drawn out by Martineau.

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Each of the forged cheques was in due course forwarded by the third party bank with which it was deposited, to the Ottawa clearing house. It was there charged up to the Bank of Montreal and sent on to that bank, which debited it in the Militia Department "letter of credit account." On the following day (the second after it had been originally deposited by Martineau) it was, with other cheques, transmitted by the defendant bank to the Militia Department, accompanying the daily sheet or statement, in the nature of a passage book, which the bank furnished to the department.

Martineau entered the Militia Department in August, 1901. It is not suggested that his superior officers had any reason to believe him dishonest, or incompetent to discharge the duties to which he was assigned. His first work was the preparation for signature of cheques for payments to be made by the department. After some weeks he was given the duty of checking the pass-book sheets sent daily by the bank to the department, with the cheques paid by the bank on the previous day and returned.

All Dominion government moneys are deposited, with the defendant bank, as in other banks, to the credit of the Receiver-General of Canada. Provision is made by the Audit Act (R.S.C. 1886, ch. 29, sec. 30), for the issue by the Receiver-General, from time to time, on application of the Auditor-General, of credits, on the several banks authorized to receive public moneys, in favour of the proper officers of the several departments, for sums voted by Parliament, payment of which has been authorized by warrant of the Governor-General. These credits, during the period covered by the Martineau forgeries, took the form of letters authorizing the bank to

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honour cheques, not exceeding in the aggregate an amount specified, to be signed, in the case of the Militia Department, by Lieut.-Col. Pinault, the deputy minister, and Mr. J. W. Borden, the accountant. By order in council the bank was authorized, in the absence of Lieut.-Col. Pinault, to honour cheques signed by B. Sulté, an officer of the department. On receipt of these letters of credit or authorization, the amount therein stated was placed to the credit of an account known as the "Department of Militia letter of credit account," but no corresponding debit entry was then made in the Receiver-General's account, nor were cheques drawn against this letter of credit account on payment debited to the Receiver-General's account, but only to the letter of credit account itself. At the end of each month, upon a statement of all cheques being furnished to the Auditor-General, and a duplicate of such statement to the Receiver-General, the latter, on the request of the Auditor-General, who is required first to satisfy himself of the correctness of such statements, causes a cheque upon his account to be prepared, signed by himself and countersigned by the Auditor-General, or their respective deputies or officers thereunto duly authorized, to reimburse the banks for advances made under such credits (sec. 30 of the Audit Act.) Upon receipt of this reimbursement cheque, the amount covered by it, and theretofore charged only against the letter of credit account, is debited by the bank in the Receiver-General's account.

I state this course of procedure in detail, for the reason that on behalf of the third party banks it is contended that the present action against the Bank of Montreal, brought to recover moneys of His Majesty wrongly paid out by that bank, must fail, because the bank has never received reimbursement cheques covering the amounts of the forged cheques, and, therefore, has not paid out His Majesty's moneys, but has advanced its own funds. The defendant bank has in fact charged up the amount of the forged cheques in the Receiver-General's account, and refuses to account to him for such moneys. It may be that the form of relief asked is not entirely appropriate. But, in substance, the question for determination is the same whatever be the appropriate form of relief, and that question is whether, as against the Receiver-General, representing His Majesty, the

Bank of Montreal is entitled to claim credit for the moneys paid out on the Martineau forgeries. If that question be determined adversely to the defendant bank—whether it be ordered to refund the amount wrongly charged up, treating such charging up as a conversion of the plaintiff's moneys, or to remove the wrongful debit entries, or to enter reversal credits in the Receiver-General's account, precisely the same problem as to the right of the defendants to indemnity from the third parties presents itself for solution.

The procedure provided for by the Audit Act has, however, an important bearing upon the main defence advanced by counsel for the Bank of Montreal, and in that aspect I shall have occasion again to advert to it.

Martineau committed the first of his detected forgeries on the 19th December, 1901, and the last on the 17th October, 1902. Ten other cheques were forged at intervals during the intervening ten months. His method, as described by himself, was to procure blank cheques by tearing them, some out of the backs of books in current use and others out of some blank books kept in reserve in the stationery bureau of the department. These cheques did not bear printed serial numbers and were not made of safety paper. Having at his command departmental documents bearing the genuine signatures of Messrs. Borden and Sulté, Martineau procured a piece of typewriter's carbon paper, and, inserting this between the blank cheque and the document bearing the genuine signature, he traced over the latter lightly, thus producing on the cheque a more or less distinct impression of each signature. These tracings he went over with pen and ink. Evidence was given of the loss of some 12 or 14 out of 16 departmental cheques supposed to have been sent to Toronto, and it was suggested in argument that Martineau had abstracted these, and, having by the use of chemicals erased all the writing except the signatures, had then filled them in to suit his purpose. Martineau positively denies this, and some of the facts in evidence do not support such a theory. Two of the Toronto cheques are produced. They are signed, not by Sulté, but by Lieut.-Col. Pinault. The numbers of the forged cheques, as found in the Bank of Montreal books, do not at all correspond with those of the

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Toronto series. The alterations involved in using the Toronto cheques would have been so numerous and so difficult as to make it almost impossible that they should have been successfully made. The forged cheques themselves, if forthcoming, would have shewn conclusively the truth or falsehood of Martineau's story. In their absence, I cannot, upon what seems an improbable theory, reject Martineau's sworn statement of his *modus operandi*, which is necessarily uncontradicted. Though he is a convict and proved to be in other respects a most unsatisfactory witness, I can find no motive on his part for lying in this particular. I, therefore, accept his statement that he forged the signatures of Messrs. Borden and Sulté to eleven of the cheques in question, and to one of such cheques, the fourth of the series, drawn for \$3,819.04, that of Mr. Borden only.

I am unable to find that there was negligence or carelessness on the part of any of the various bank officials who handled these cheques, except as to the cheque which Martineau says bore only the one false signature. It may be that the officials of the Quebec bank, in which this cheque was deposited, had not the means of knowing that the second signature was required. There is no evidence that the Quebec Bank had an account with the Militia Department, or indeed with any other department, similar to that in the Bank of Montreal against which these cheques were drawn. It is impossible, however, to escape the conclusion that there was culpable carelessness on the part of the officers of the Bank of Montreal who passed the particular cheque now under consideration. Such blunders should be practically impossible with well trained bank officers held strictly responsible for any carelessness. Counsel for the defendants urged that I should discredit Martineau as mistaken, if not romancing, when he said that one of these cheques did not bear a second signature. But the production in evidence of a Militia Department cheque, which has been paid by the Bank of Montreal, though bearing no signature whatever, shews Martineau's statement to be by no means incredible. As to the cheque for \$3,819.04, the negligence of its own officers precludes the defendant bank from setting up any subsequent default of its customer in bar of his claim.

During the months in which he committed his forgeries,

Martineau's duties included the checking of the daily pass-book sheets sent by the bank to the department. These sheets, with the accompanying cheques, were received by Mr. Holt, acting for the accountant of the department, to whom the registered envelope containing them was addressed. The usual acknowledgment of receipt of a registered letter was given by him, and the cheques in the envelope, frequently unopened, were then handed over to Martineau to be checked. Martineau promptly abstracted and destroyed his forgeries, which thus came to his hands. At the end of each month the bank sent to the department a detailed statement shewing all the deposits made to the credit of the departmental account and all withdrawals by cheques during the month. Martineau was intrusted with the comparison of this statement with the cheques received during the month, and, upon his report of its accuracy, a receipt for such cheques and an acknowledgment of the correctness of the balance as shewn by the statement were given to the bank, signed by Mr. Holt for the accountant, or by the deputy minister himself. Such receipts and acknowledgments are produced for the whole period covered by the Martineau forgeries, and the balances which they shew were, in each instance, reached by debiting the forged cheques to the departmental account.

The Bank of Montreal kept a separate "letter of credit account" with the department for each financial year. In order to postpone, as long as possible, discovery of his criminal conduct, about the time when the accounts for the fiscal year 1901-2 were in the course of final adjustment, Martineau forged a letter from the accountant of the department to the accountant of the Bank of Montreal requesting (as was quite a usual thing where the bank had charged in the account for one financial year cheques drawn to pay items provided for in the appropriations of another year) the transfer from the account of 1901-2 to that of 1902-3 of a certain cheque, and the transfer from 1902-3 to 1901-2 of two other cheques, the net result being a transfer from the debit side of the 1901-2 account of an amount approximately sufficient to cover the forgeries on that account down to the date of this forged letter.

At the close of each month the Auditor-General received

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from the bank a statement shewing the balance standing to the credit of each of the departmental letter of credit accounts, and also the net general balance to the credit of the government. The department also furnished to the Auditor-General a monthly statement shewing the credits to which the department had been entitled during the month, and the expenditure shewn on its books and represented by cheques drawn against its letter of credit account. As the latter statement included all the cheques drawn, and the former only cheques actually presented for payment, the credit balance shewn in the bank statement should always have been equal to or greater than that shewn in the department statement. From September, 1902, to February, 1903, a comparison of these statements establishes that instead of being greater than or at least equal to the balance shewn on the department statement, that shewn on the bank statement was in each month less, the discrepancies ranging from \$10,000 to \$60,000 in round figures. These somewhat startling shortages in the funds which the bank acknowledged holding appear to have passed unnoticed in the Audit office.

An investigation, made as the result of Mr. Holt having noticed, in February, 1903, that the balance shewn to the credit of the department by its books largely exceeded that stated in the usual monthly receipt asked for by the Bank of Montreal, resulted in the discovery of the series of frauds, and ultimately, on the 19th February, 1903, in the arrest of Martineau charged with forging the 12 departmental cheques, the subject of this action.

The department promptly notified the Bank of Montreal of the discovery of the forgeries and of the intention of the government to make the claim now in suit. A similar notification was without delay given by the defendants to each of the third parties.

The right of the Crown to recover in this action is tacitly conceded, both by the defendants and the third parties—subject to a question already alluded to, as to the form of relief sought—unless alleged omission or neglect by officers of the government of duties, which the ordinary customer owes to his bank, has barred such right.

Mr. Shepley, for the defendants, discarding as a ground of defence everything in the nature of negligence affording opportunity for, or conducing to the commission of, the forgeries, rests his argument entirely upon an alleged breach by the Crown of a supposed contract or undertaking on its part, arising from the relation of banker and customer, that, when supplied by the bank with the means to do so (a pass-book with entries of credits and debits and paid cheques as vouchers for the latter) it would with due diligence cause the pass-book and vouchers to be examined and would report to the bank, without unreasonable delay, any errors which should be discovered. Breach of this contractual obligation, Mr. Shepley argued, has entirely relieved the bank from liability to account to its customer. Mr. Gormully, however, contended that there was such negligence in the circumstances preceding the forgeries as conduced to their commission: that, apart from contractual obligation, there was such negligence on the part of the government officials in regard to the checking of the statements furnished by the bank, and the acknowledgment of the correctness of such statements, and in giving to the bank receipts for its cheques, that it would now be inequitable to permit the Crown, after the destruction by one of its own officers of the vouchers for the items in question, to open up what is in effect a settled account. Both learned counsel argued that by the conduct of its officers the Crown is estopped from enforcing its claim upon the defendants, whose position in regard to relief against the third parties has been seriously affected as the result of breaches of duty by the officers of the Crown. Counsel for the third parties urged similar grounds of defence.

I find nothing of negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission—nothing which would affect the right of any customer of the defendant bank to recover in such an action as this. Perhaps as much cannot be said in regard to their dealings with the statements and vouchers furnished by the bank.

I put aside the apparent neglect in the department of the Auditor-General to make comparison of the monthly statements furnished him by the Militia Department with those sent to

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him by the bank, because, although an investigation into the discrepancies which such a comparison would have disclosed, must have unearthed these forgeries several months before they were actually discovered, the omission to make such comparison would not, in my opinion, be a breach of a duty owing to the defendants had it occurred in the conduct of the business of any ordinary customer.

But, were the present plaintiff other than His Majesty, I should not, in respect of the eleven forged cheques, as to which I have found there was no want of proper care on the part of its officials, without very mature consideration, reject, as unavailing to the Bank of Montreal for its defence, the failure of the depositor himself to check over his pass-book, or, if this duty was entrusted to an employee, to exercise reasonable diligence in supervising the conduct of his clerk in discharging the trust committed to him: *Leather Manufacturers' Bank v. Morgan* (1886), 117 U.S. 96, 116. If the employer has not been negligent in the selection of his employee, it seems at first a little difficult to understand upon what principle, he should, though relieved of responsibility for his clerk's dishonesty in committing a forgery, be held liable for his dishonesty in concealing it. Yet, in regard to fraudulent checking, it is said that the bank cannot be in a worse position because its depositor employs a dishonest clerk for this purpose, than it would have been had this important work been intrusted to honest hands: *Critten v. Chemical National Bank* (1902), 171 N.Y. 219, 230. But see *Chatterton v. London and County Bank*, The Times, 21st January, 1891; Paget on Banking, p. 123. The employer is held responsible in the latter case probably because the clerk omits a duty which he was employed to discharge, and which his employer was bound to perform, or cause to be performed, whereas the actual forgery is an act of commission entirely outside the scope of the clerk's employment.

While there is no evidence of any negligence in selecting Martineau for this work of checking, or of any reason to suspect his honesty, the principal officers of the Militia Department seem to have placed extraordinarily implicit confidence in the integrity, the competence, and the diligence of one so

recently placed upon their staff. It may be difficult to say, where delegation, not only of the duty of checking, but also of any supervision over the person intrusted with the duty, is inevitable, what provision for such supervision will be adequate to protect the customer of a bank from liability. Apart from an absolute contract binding the customer to check efficiently himself, or to have such checking properly done, for failure to perform which no excuse would avail, negligence is the foundation of the customer's liability, and the limitations of practical business would be taken into account in determining what, in each particular case, should be held to constitute such negligence. The proprietor of a large mercantile establishment may intrust to his most esteemed assistants the duty of supervising this examination of his bank pass-book, "*sed quis custodiet ipsos custodes.*"

Martineau, however, was under no supervision whatever.

A mere comparison of the cheques returned with the items of the daily statement furnished by the bank, though made by a careful and upright man, would not have disclosed these forgeries. But any reasonably careful comparison of the bank pass-book sheets, or of the returned cheques either with the cash account of the department, or with the stubs in its current cheque-books, would have resulted in their prompt detection. Nobody in the department appears to have been charged with the duty of making any such comparison. Intrusted to the forger himself, without supervision, even this comparison would, of course, have served little purpose.

But, though the relation of customer and banker is recognized as that of mandant and mandatory (*Scholfield v. Londesborough*, [1896] A. C. 514, 537, 545, 548, 550), no English authority establishes any contractual obligation on the part of the banker's customer to examine his pass-book. Indeed there is modern English authority for the proposition that the customer in regard to his pass-book and vouchers owes to his bank no duty which he must discharge at the peril of being bound, if he omits it, by the debit entries contained in the pass-book as by a settled account. See *Chatterton v. London and County Bank*, referred to at length in Sir John Paget's work on Banking, pp. 120 *et seq.*

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In *Vagliano v. Bank of England* (1889), 23 Q.B.D. 243, Bowen, L.J., delivering the judgment of the majority of the Court of Appeal, speaks of the obligation in regard to the pass-book as resting upon implied contract as to the settlement of account, or as a duty of the customer to the bank arising from the ordinary course of dealing between banker and customer, and, in either case, as something to be established by evidence. Counsel, at p. 245, are reported as having argued that the receipt of the pass-book, with items debited representing forgeries, accompanied by the vouchers, and retention of the latter without objection, amounted to a settlement of the account, which the plaintiff's negligence in regard to the examination of the vouchers precluded him from having opened. This contention the Court by implication rejected. The House of Lords in reviewing this decision, [1891] A.C. 107, proceeded upon other grounds, and, though the judgments refer to the duties of the customer in regard to the pass-book, pp. 115, 116, 128, they do not indicate their Lordships' views as to the precise nature of his obligation.

No evidence of the custom or course of dealing between banker and customer was offered at the trial of this action. Counsel dealt with the matter not as depending upon evidence, but as a question purely of law—a legal inference from or incident of the relation of banker and customer.

In *Commercial Bank of Scotland v. Rhind* (1860), 3 Macq. H.L. 643, Lord Campbell treats the pass-book, returned by the customer without objection, as affording *prima facie* evidence for the bankers as to entries with which the customer is debited, and against them as to entries on the other side.

In the American cases in which the duty of examination by the depositor is clearly affirmed and knowledge is imputed to him of all that such an examination carefully and honestly made would give, and in the English cases in which the customer aware of forgeries and failing to communicate such knowledge to his bank, has been deemed to have adopted such forgeries (*McKenzie v. British Linen Co.* (1881), 6 App. Cas 82, 110, *Ogilvie v. West Australian Mortgage and Agency Corporation*, [1896] A.C. 257, 270), the defence available to the bank is treated, not as the breach of an implied contract, but

rather as an estoppel, entitling the bank to resist, in the former class of cases the opening of the settled account between itself and its customer, and, in the latter, the re-payment to the customer of the amount of the forgeries held to be ratified or adopted, without proof that even the most prompt and complete discharge by the customer of the duties imposed upon him would have enabled the bank to recover the whole or any part of the moneys obtained by the forger.

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The consequences to the customer of this breach of duty are in such cases not confined to the actual pecuniary loss which the bank can prove it to have caused, as they probably would be if the failure to examine the pass-book and vouchers and report promptly to the bank, were deemed a breach by the customer of an implied contract entitling the bank to damages by way of set-off, or to resist *pro tanto* the customer's demand for re-payment.

The arguments for the imposition upon the customer of the duty which the defendants claim he owes them in regard to the pass-books are cogent, and the American cases, if binding as authorities, would be conclusive in favour of the bank. The English authorities do not appear at all so strongly to support the defendants' contention. Sir John Paget says at p. 120 of his work: "In the meantime, and until evidence of the nature suggested by the Court of Appeal is forthcoming, but little reliance can be placed on the pass-book as precluding a customer from disputing debits which have appeared in the book both when delivered to him and returned by him without objection, or from denying the genuineness of his signature to cheques which represent such debits, and have been returned paid with the book and retained by the customer without comment." See too Hart on Banking, pp. 200, 203.

In disposing of the present action on this question, I should, on the other hand, have to consider a matter not urged by counsel for the plaintiff. Although the evidence upon this point is not wholly satisfactory, I think it may fairly be inferred that the Bank of Montreal had from month to month in its own hands the means of detecting discrepancies between its accounts and those of the department caused by these forgeries. The monthly reimbursement cheques of the

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Receiver-General, prepared on the basis of the departmental monthly statements furnished to the Auditor-General, certainly did not cover the sums charged up by the bank on account of the forgeries in its books and in its monthly statements rendered to the department and to the Auditor-General. It is difficult to account for the failure of careful bank officers to notice that each of the monthly reimbursement cheques from January, 1902, to February, 1903, was drawn for a smaller sum than the bank books and statements shewed to be due, the difference increasing with every forgery committed until, for each of the last three months, it amounted in round figures to \$75,000, less only the amount of unrepresented cheques. It is still more difficult to understand how, during this period, if the books of the Ottawa branch of the Bank of Montreal were balanced, these discrepancies remained undiscovered, or if discovered why an investigation, which would undoubtedly have unearthed the forgeries, did not promptly follow. How far the bank's failure to avail itself of this means of detecting the frauds in question might be an answer to any counter-neglect of an ordinary depositor in regard to the checking of his pass-book and vouchers need not, however, be now determined.

But from another point of view these refunding or reimbursing cheques have a direct and very important bearing upon the rights of the plaintiff and the defendants.

The defendants knew that they were dealing with the department under sec. 30 of the Audit Act. They must be deemed to have opened the Militia Department letter of credit account and to have conducted the business connected with it upon the basis of that legislation. They knew that provision is there made for the issue of cheques "to reimburse the bank for advances under credits to cover the expenditures made and authorized."

This is the mode of "settling the account" between the bank and the government prescribed by the statute. It sanctions no other. The transmission by the bank to the department of the daily pass-book sheets with the paid cheques, however convenient in practice, is not a method of checking or settling the departmental account contemplated by the Audit Act. Whatever authority government officers may have to

bind the Crown by a settled account must, in view of these express statutory provisions, be restricted to what they authorize and direct. If so, the bank would seem not to have had the right to regard the retention of pass-book sheets and vouchers without objection as a settlement of accounts. The express provisions of the statute under which the dealings in question were conducted excludes any implication such as might arise in the case of an ordinary customer. Those provisions defer the adjustment of the interim advances made by the bank under the credits issued to it until the Receiver-General, at the instance of the Auditor-General, issues his reimbursement cheque. The sending of this reimbursement cheque and its acceptance by the bank without protest must therefore be regarded as effecting the settlement of the account between the bank and the Crown, if there ever was such a settlement. No reimbursement cheque covered the Martineau forgeries. It may well be that the bank, by its acceptance and retention of these reimbursement cheques without protest, bound itself by settlements of account which exclude the items that it now claims to charge against the plaintiff. If the view which I have expressed of the effect of sec. 30 of the Audit Act be correct, it follows that the bank cannot on any plea of settled account justify its retention of His Majesty's moneys to cover these forgeries.

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Although in *Critten v. Chemical National Bank*, 171 N.Y. 219, the Court declines to treat the liability of the depositor as resting upon either an implied adoption of the forged cheques as genuine, or a ratification of their payment, or an estoppel from asserting that they are forgeries (p. 228), since *Devaynes v. Noble* (1816), 1 Merivale 529, 535, where Courts have held the depositor for want of examination of his pass-book and vouchers chargeable with forgeries debited to his account, it has almost invariably been upon the ground that "his silence is regarded as an admission that the entries are correct." In *Leather Manufacturers' Bank v. Morgan*, 117 U.S. 96, the Supreme Court of the United States treats such a case as a settlement of accounts by conduct working an estoppel. In *Blackburn Building Society v. Cunliffe, Brooks, & Co.* (1882), 22 Ch. D. 61, at pp. 71-2, Lord Chancellor Selborne, delivering

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the judgment of the Court of Appeal, speaks of "the doctrine that a pass-book passing to and fro is evidence of a stated and settled account." This I take to be the true ground upon which the ordinary customer, who has had opportunity to examine his pass-book and vouchers, and has failed with reasonable promptness to notify the bank of such forgeries as by a proper examination he would have discovered, is precluded from objecting to these debit items in his account. That ground, for reasons above stated, is not, I incline to think, available to the present defendants.

But upon another ground of a very different character their defence must fail. To whatever disabilities the circumstances above adverted to might subject the plaintiff in this action, were he an ordinary customer of the defendant bank, they do not, in my opinion, in any wise embarrass the position of His Majesty as a suitor. Whether the defence, which counsel urge is available to a bank against its customer who neglects the duty of examining his pass-book and vouchers with ordinary diligence, should be regarded as arising from breach by the customer of an implied contract or undertaking on his part to perform this duty, or as an estoppel resulting from conduct by negligence or omission inducing a reasonable belief, and therefore tantamount to a representation that the statements as rendered by the bank were correct, upon which the bank has acted or abstained from action to its prejudice—in either aspect, if effectual in this action, such defence would involve imposing upon the Crown responsibility for the fraud, the negligence, or the omission of its servants. In the one case the Crown would be deemed by implication to have guaranteed the honesty, the fidelity, and the diligence of its employees; in the other it would be precluded from shewing the truth by reason of the breach of duty of its servants.

The King is not bound by estoppel: *Vin. Abr. (Estop.) 432*; *The Queen v. Delme (1714)*, 10 Mod. 199, 200.

The government "does not undertake to guarantee to any person the fidelity of any of its officers, or agents whom it employs:" *Story on Agency*, sec. 319. Nor may the government, under guise of a breach of an implied contract, be made responsible for laches of its officers for which it would not be

directly liable as for breach of duty tortious in character : *Gibbons v. United States* (1868), 8 Wallace 269, 274 ; *United States v. Kirkpatrick* (1824), 9 Wheaton 720, 735 ; *Seymour v. Van Slyck* (1832), 8 Wendell 403, 422.

" Even in regard to matters connected with the cause of action relied on by the United States, the government is not responsible for the laches, however gross, of its officers:" *Nichols v. United States* (1868), 7 Wallace 122.

It is a standing maxim of English law that in the King there can be no laches: Black. Com., vol. 1, p. 247. For the same reason negligence is not imputable to him.

" This doctrine is indeed not confined to an exoneraton of the Crown from liability for the torts of its agents and servants, but is carried so far as to exonerate the Crown or government from the non-performance of contractual obligations, which in the case of private persons would be fatal to their rights, when such non-performance or negligence consists in the omissions of public officers to perform their duties : " *per* Strong, J., in *The Queen v. McFarlane* (1882), 7 S.C.R. 216, at p. 242. " In the case of contracts, they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants : " *per* Strong, J., in *The Queen v. McLeod* (1883), 8 S.C.R. 1, at p. 28. " If Her Majesty could not be made liable in tort for the negligence of the persons who caused the injury to the suppliant of which he complains, it is impossible that she should become liable from the fact that the negligence which is said to have caused the injury is alleged to be in breach of a duty arising out of a contract : " *per* Gwynne, J., S.C., at p. 66. See too *Black v. The Queen* (1899), 29 S.C.R. 693, 699.

In *Cooke v. United States* (1875), 91 U.S. 389, Waite, C.J., delivering the opinion of the Court, at p. 398, says: " Generally, in regard to all the commercial business of the government, if an officer specially charged with the performance of any duty . . . neglects that duty, and loss ensues, the government must bear the consequences of his neglect." And (in an earlier part of the judgment on the same page): " If it comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern indi-

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viduals there." In *United States v. Barker* (1827), 12 Wheaton 559, it is laid down that the government, as holder of a bill of exchange, is bound to use the same diligence to charge the drawer and indorsers that is required of individuals; failure in this involves the loss of its claim against them.

In England the Crown, holding a bill of exchange seized under an extent before it is due, is said to be not chargeable with the neglect of its officer to give notice of dishonour: West on Extents, pp. 26, 29; Byles on Bills, 15th ed., p. 290. It may be contended that in this latter case the holding by the Crown is ascribable to the exercise of powers incident to its sovereignty, and not to any "entry into the domain of commerce." But neither should the opening in a chartered bank of a current account, necessary for the convenient handling of its moneys to be used in meeting the exigencies of the public service, be deemed an undertaking of commercial transactions implying an abrogation *pro tanto* or *quoad hoc* of privileges and rights peculiar to sovereignty. If it were, the government could not, without seriously endangering public interests, avail itself of the facilities afforded by an institution owing its existence to a parliamentary charter.

Whatever may be the case in the United States, where the immunity of the government from responsibility for the laches or negligence of its officers is founded upon considerations of public policy, in British dominions, where this wholesome privilege is part of the ancient prerogative right of the Crown, no implication of waiver by conduct, no consent express or implied given by any officer (*The Queen v. Bank of Nova Scotia* (1885), 11 S.C.R. 1, 11), no inference of extinction or abandonment to be drawn from statutory provisions (*Liquidators of Maritime Bank v. The Queen* (1889), 17 S.C.R. 657, 661), nothing less equivocal, authentic, and compelling than a clear legislative enactment, in express terms taking it away, can be permitted to deprive the sovereign of the protection afforded by this portion of His royal prerogative, if He be minded to claim it: Chitty on Prerogative, p. 383.

In my opinion, therefore, the plaintiff is entitled to recover from the defendants the amount claimed, \$75,705, with interest from the date at which such sum was, or the respective dates at

which its component parts were, charged against the account of the Receiver-General of Canada, and were thus converted to the use of the defendants. From this, however, must be deducted the sum of \$12,443.77, found upon Martineau's person when arrested, which was taken possession of by the Dominion government. This money Martineau acknowledges to be a portion of that derived by him from his forgeries. Interest upon this latter sum from the date of its recovery must also be credited. The plaintiff shall have the costs of this action from the defendants.

The questions raised by the claim of the defendants against the third party banks must now be considered. Counsel for the Bank of Montreal argued that the third party banks are liable as indorsers, or upon warranty or representation that the cheques were genuine, involved in or to be implied from their presentation of such cheques for payment through the clearing house. The defendants also claim to recover from each of the three banks to which they paid proceeds of the forgeries, the several amounts thereof as moneys paid and received by and under mistake of fact.

Upon the evidence I find that the third party banks were not indorsers. They did not become parties to the cheques to pass title thereto. They did not place their names upon them with intent to assume liability, or for any other purpose than to identify as their property such cheques as they had respectively sent to the clearing house, and to signify to the officer there in charge to what bank he should credit such cheques. Nothing depends upon the fact that these forged cheques were passed through the Ottawa clearing house (see rule 2.)

Neither did they warrant or represent anything as to the genuineness of the cheques. The defendants did not act voluntarily on the request of the third parties. They paid in assumed discharge of their obligations to the plaintiff. In such cases there is no implication either of warranty or of representation upon which a claim for indemnity could be founded: *Corporation of Sheffield v. Barclay*, [1903] 2 K.B. 580. Neither was there any passing of title by delivery, the cheques being "at home" with the Bank of Montreal.

The third parties resist the claim of the defendants upon

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several distinct grounds, viz.: 1st., that there was negligence on the part of the defendants in making the payments which precludes recovery; 2nd., that, by the law merchant, failure on the part of the drawee to give notice of dishonour of a forged bill on the day of its presentment and payment absolutely discharges a *bond fide* holder for value who has received payment innocently; 3rd., that a similar statutory obligation, its breach entailing like consequences, is imposed by sec. 54 of the Bills of Exchange Act; 4th., that the fact that the defendants paid their own customer's cheque, and the change in position of the third parties since payment by the defendants, render it inequitable that the latter should be permitted to recover.

I have found that, except as to the fourth cheque of the series, there was no negligence on the part of any of the bank officers in passing these cheques. It may be that the special negligence on the part of the Bank of Montreal in regard to the fourth cheque, precludes recovery from the Quebec Bank of the money paid upon it. I find it unnecessary to dispose of this question.

On behalf of the Royal Bank evidence was given to establish that, although, when deposited, the last two cheques of the series were formally placed to Martineau's credit in his account, the ledger keeper was in fact instructed not to permit him to draw against that account in respect of the sums represented by these cheques until they had been actually paid by the Bank of Montreal. It is not pretended that Martineau was informed of these special instructions or of anything which would restrict his right to treat these deposits as actual credits which he was immediately entitled to use. In *Capital and Counties Bank v. Gordon*, [1903] A.C. 240, at p. 245, Lord Macnaghten says: "It is well settled that if a banker before collection credits a customer with the face value of a cheque paid into his account the banker becomes holder for value of the cheque." And Lord Lindley, at p. 249: "It must never be forgotten that the moment a bank places money to its customer's credit, the customer is entitled to draw upon it, unless something occurs to deprive him of that right. Nothing occurred in this case to the knowledge of the bank which had any such effect." I cannot regard the Royal Bank as a mere agent of Martineau for

the collection of the cheques deposited with it. Like the two other third party banks, on whose behalf no such evidence was offered, I must treat the Royal Bank as holder in due course of the two last cheques of the series, so far as there can be a *bonâ fide* holder in due course of forged paper. (Bills of Exchange Act, sec. 29.)

On behalf of the Quebec Bank it was proved that its rules requiring certain notices of withdrawal to be given are notified to depositors by being printed inside their pass-books. The manager, on examination in chief, stated that these rules were insisted on; but on cross-examination he conceded that the rule requiring 15 days' notice of withdrawals is not always observed.

In the case of the Royal Bank the pass-book contains a notice that the bank reserves the right to require 15 days' notice when all or any portion of a deposit is withdrawn. There is no evidence of any similar provision affecting the Sovereign Bank account.

An examination of the Côté account with the Quebec Bank, shews that notice of the forgeries to the bank would have enabled the bank to protect itself, in the case of the first forged cheque, if given on or before the 5th day after it was deposited; of the second cheque, if given on or before the 69th day; of the third, on or before the 39th day; of the fourth, on or before the 34th day; of the fifth, on or before the 5th day; and of the sixth on or before the 3rd day. In the case of the Sovereign Bank, notice would have had a similar effect if given as to the seventh and eighth cheques on or before the 7th day after their deposit, and as to the ninth and tenth cheques, on or before the 3rd day following their deposit (allowing for accumulated interest not credited.) In the case of the Royal Bank, notice would have been effective if received in the case of the eleventh cheque, on or before the 6th day following its deposit, and of the twelfth cheque, on or before the 8th day after its deposit. In each case a still later notice would have enabled the bank to protect itself as to part of the amounts of these cheques, which, except three, were paid by the defendants on the day after their deposit with one of the third party banks. The second cheque, deposited on the 21th December, 1901, was paid on the 26th

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December, 1901; the fifth, deposited on the 18th April, 1902, was paid on the 21st April, 1902, being the second juridical day after its deposit; and the last cheque, deposited on the 15th October, 1902, was paid on the 17th October, 1902.

In the case of every cheque of the series, therefore, the position of the recipient bank was altered to its prejudice after the day on which payment was made by the defendants. This clearly distinguishes the present case from *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49, in which the face value of the forged cheque had been obtained by the depositor from the former bank before its presentation for payment at the latter. The Privy Council, in holding the want of notice of the forgery to the Imperial Bank on the day of payment to be unavailing as a defence, lays distinct stress upon the fact that "no loss has been occasioned by the delay in giving it" (p. 58). The question presented for my determination, therefore, is not concluded by that decision. I have not overlooked the language found at p. 57 of the report, where Lord Lindley, speaking for the Board, says: "Quite apart from the fact that the appellants were not in any way prejudiced by want of notice on the day of payment, it appears to their Lordships that the stringent rule referred to . . . does not really apply to this case." His Lordship was speaking of the well-known rule in regard to genuine bills and notes laid down in *Cocks v. Masterman* (1829), 9 B. & C. 902, "reasserted in even wider language by Mathew, J., in *London and River Plate Bank v. Bank of Liverpool*," [1896] 1 Q.B. 7. That rule in nowise depends upon negligence, and involves a conclusive presumption of prejudice for want of notice on the day of presentation for payment. The Judicial Committee held it inapplicable to "a simple forgery," whether or not actual prejudice resulted from notice not being promptly given. I understand that this judgment simply excludes from consideration, as inapplicable to the case of mere forgeries, such as we are dealing with, the rules as to notice established in regard to genuine bills and notes.

What I have said answers the second and third contentions of counsel for the third parties, but does not affect the question raised by their final contention as above stated. As to the

third ground, the Bank of Montreal never was an acceptor of any of these cheques within the meaning of sec. 54 of the Canadian Bills of Exchange Act (see sec. 17, sub-sec. 2). I, therefore, proceed to deal with the question between the defendants and the third parties apart from all considerations as to notice peculiarly applicable to bills and notes of established genuineness.

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Where in the course of business, as the result of mistake of fact between them, a loss has fallen on one of two equally innocent and blameless parties, it is held by some courts in the United States that such loss must remain where the chance of business has placed it: *Gloucester Bank v. Salem Bank* (1820), 17 Mass. 33. Though this doctrine received some countenance from Mansfield, C.J., who said, in *Price v. Neal* (1762), 3 Burr. 1354, 1357, "If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man," it is now well established in English law that money paid and received under mutual mistake of fact may be recovered back unless, under all the circumstances, it would be inequitable to permit such recovery: *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49; *Kelly v. Solari* (1841), 9 M. & W. 54; *Ryan v. Bank of Montreal* (1886-7), 12 O.R. 39, 14 A.R. 533.

The grounds upon which recovery has been successfully resisted in many cases of forged signatures are two, viz.: that the fact that the person seeking to recover is the banker of the drawer, whose signature has been forged, in the absence of any fault on the part of the payee, deprives him (the banker) of all right to relief; and that a prejudicial alteration of his position by the payee after payment renders it unjust that he (the payee) should be required to refund. These two grounds demand careful investigation.

For the defendants it is contended that, while the duty of the banker to his customer to know his signature is absolute, he owes no such duty to any other person, and no third party can claim any benefit from such an obligation.

It cannot be denied that there is a great mass of authority to the contrary. In *Price v. Neal*, 3 Burr. at p. 1357, Lord Mansfield says: "It was incumbent upon the plaintiff to be

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satisfied 'that the bill drawn upon him was the drawer's hand,' before he accepted or paid it." In *Smith v. Mercer* (1815), 6 Taunt. 76, at p. 81, Dallas, J., says: "If an acceptor is then bound to know the drawer's hand-writing, is it less the duty of a banker to know the hand-writing of his customer? In degree, it is more so; for he sees it, probably, every day. I consider therefore the payment of this bill as a want of due caution on the part of the plaintiffs." Heath, J., says (p. 86): "The situation of bankers is most peculiar: they are bound to know the hand-writing of their customers." Gibbs, C.J., approves of these statements. In both these cases the right of recovery of the banker from the holder for value, whom he had paid, was under consideration. In neither was there any evidence that by greater care the forgery could have been detected.

In *Wilkinson v. Johnson* (1824), 3 B. & C. 428, 436, the Court speaks of the fault of a drawee who pays on a forged signature. To Bramwell, B., in *Hart v. Frontino, etc., Gold Mining Co.* (1870), L.R. 5 Ex. 111, at p. 115, is attributed this statement: "As against a *bonâ fide* holder for value a banker paying a forged cheque . . . cannot afterwards recover back the money." In *Simm v. Anglo-American Telegraph Co.* (1879), 5 Q.B.D. 188, at p. 196, Lindley, J., says: "A banker paying a forged cheque to an innocent holder for value cannot recover back its amount." In *Sheffield Corporation v. Barclay*, [1903] 2 K.B. 580, Vaughan Williams, L.J., refers approvingly to the dicta of Bramwell, B., and Lindley, J.

In *Union Bank of Lower Canada v. Ontario Bank* (1880), 24 L.C. Jur. 309, Dorion, C.J., says (p. 316): "If a bank accepts a forged cheque of its own customer, and the forgery consist in the signature of its customer, it cannot recover the money, because it is bound to know the signature of its own customer." And Cross, J., adds (p. 318): "An admitted exception is where the drawee of a bill pays it, thus recognizing the signature of the maker. He must bear the loss if it turns out that the maker's signature is forged." Numerous American cases may be found to the same effect: see *Levy v. Bank of United States* (1802), 4 Dall. 234; *Bank of United States v. Bank of Georgia* (1825), 10 Wheaton 333. In the case last

cited Story, J., says (p. 354): "After some research, we have not been able to find a single case in which the general doctrine, thus asserted, has been shaken or even doubted." See too *National Bank of Commerce v. National Mechanics' Banking Association* (1873), 55 N.Y. 211, 213, 214. These cases would afford ample authority to support a judgment against the defendants.

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It will be noticed, however, that neither Lindley, J., nor Bramwell B., speaks of the banker as bound to third parties to know his customer's signature. While advancing the proposition broadly that his mistake precludes recovery, these Judges abstain from stating for what reason it is, or should be so. Cross, J., alludes to the banker's recognition of the forged signature.

There is no relation between the banker and the payee which can extend to the latter—a stranger—the obligation which the banker is under to his customer, the real foundation of which must be that, in the absence of a genuine signature, the banker has no mandate or authority from the customer to pay. Notwithstanding the profound respect which I entertain for such eminent jurists as Lord Mansfield, Sir A. A. Dorion, and Mr. Justice Story, I am bound to express my opinion that the alleged right of the stranger to set up a duty to himself of this kind appears to rest upon no solid foundation, and is incapable of logical proof; and, in the light thrown upon the real position of simple forgeries by the Privy Council judgment in *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49, the propositions stated by all the distinguished Judges whom I have quoted, must, I venture to think, be deemed too broad.

In the much canvassed case of *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, at pp. 10, 11, Mathew, J., discussing some of the judgments from which I have taken excerpts, and realizing the difficulty which I find, would support them by suggesting as the real ground for these decisions the rule laid down in *Cocks v. Masterman*. But Mathew, J., spoke before it was decided that the holder of a simple forgery has not the same rights as to notice which belong to the holder of genuine negotiable paper.

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Finding myself unable to agree with the proposition that the banker owes to the holder of a cheque the duty of knowing his customer's signature, I prefer not to rest my decision upon it.

Upon a distinctly different ground the banker may be precluded from recovery. The finding that there was no negligence on the part of the Bank of Montreal officials (except as to the fourth cheque) because the forgeries were so executed that no reasonable care in examination would have detected them, involves a finding that the bank had not means of knowledge. It is not, therefore, driven to rely upon the principle established by *Kelly v. Solari*, 9 M. & W. 54. (See *Jacobs v. Morris*, [1902] 1 Ch. 816, at p. 833.) But, though he has neither knowledge nor the means of knowledge of the forgeries, if a banker by his conduct represents to a person in the position of any of the third party banks that he is prepared to treat a drawer's forged signature as genuine, and such person, in consequence of such representation, acts, or refrains from acting, to his prejudice, is the banker *ex æquo et bono* entitled to ask the Courts to shift his loss to the innocent person whom he has misled, however blamelessly? Did the defendants so represent?

Mathew, J., meets this situation in *London and River Plate Bank v. Bank of Liverpool*, [1896] 1 Q.B. 7, thus, when, speaking of *Price v. Neal*, he says (p. 70): "It seems to me the principle underlying the decision is this: that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine he could not afterwards withdraw from that position." But the banker did in fact consider the signature genuine, and, unless his conduct is to be taken as calculated to convey more than this belief to the holder whom he pays, there is no misrepresentation to found an estoppel. He, therefore, need not seek to withdraw from that position. Does he not, however, go further and impliedly assert that he accepts and assumes responsibility for the cheque as genuine? Such, it seems to me, is the construction which a reasonable man might be expected to put on a banker's payment of his customer's cheque drawn upon him, and it is from this position that he cannot, if his assumption of it has been the cause of appreciable detriment to a person who might be ex-

benefit might accrue to them. It is unimportant whether they would have taken steps to secure the benefit or not."

It is not unreasonable to infer that the change in position of the third party banks, subsequent to the payment by the defendants of the forged cheques, is attributable, in part at least, to the fact that such payment was made. They refrained from taking steps which there is every reason to suppose they would have taken in the event of non-payment by the defendants on presentation—a fact of which they would undoubtedly have had prompt notice.

Though the inference that the loss sustained is ascribable to the misrepresentation established is not a conclusion of law, as had been stated by Jessel, M.R., in *Redgrave v. Hurd*, 20 Ch. D. 1 (*Smith v. Chadwick*, 9 App. Cas. at p. 196, *Smith v. Land and House Property Corporation* (1884), 28 Ch. D. 7, 16), without express evidence that the payments to Martineau by the Sovereign Bank and the Quebec Bank were induced by the fact that the Bank of Montreal had honoured the cheques deposited by him, as a juror I find little difficulty in drawing such an inference of fact.

Upon the ground of estoppel arising from its payment of the forged cheques and the change in the position of the third parties which ensued, rather than for default or breach of duty in failing to detect forgeries of its customer's signature, or upon any conclusive presumption of culpable negligence raised by that misfortune, the Bank of Montreal should, in my opinion, be held not entitled to recover.

Apart from any application of the principles of estoppel, the third parties appear to have a defence to the claim made upon them for repayment. "When one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Although the third party banks had credited Martineau's account with the amount of the forged cheques before they were presented for payment, that mistake or indiscretion, if I may so call it, would have been quite innocuous to them, had it not been for the subsequent mistake of the defendants in honouring those cheques. This act of the defendants was, I think, the proximate cause which enabled Martineau to reap the benefit of his frauds.

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Upon the principles established by *Lickbarrow v. Mason* (1787), 2 T.R. 63, they must bear the loss. Upon both grounds, however, in my opinion, the defendant cannot *ex æquo et bono* claim to be relieved at the expense of the third parties from the loss which they have sustained.

But, inasmuch as the third parties have upon equitable grounds successfully resisted the defendants' claim, they must in turn do equity. While the claim made against the third parties will be dismissed with costs, the Quebec Bank must pay to the defendants the balance of \$5, which it appears to hold at Martineau's credit. The Sovereign Bank account and the Royal Bank account had been closed before Martineau was arrested.

In *Parsons on Bills and Notes*, 2nd ed., p. 80; in *Daniel on Negotiable Instruments*, 5th ed., pp. 378-9, and 682; in *Hart on Banking*, p. 203; in *Chitty on Bills*, 11th ed. p. 431; and in *Sir John Paget's Law of Banking*, pp. 164 *et seq.*, will be found statements supporting several of the propositions upon which this judgment rests.

E. B. B.

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Distribution of Estates—Ascertainment of Next of Kin—Legitimacy—Foreign Law—Conflict of Expert Testimony—Determination by Court. WILSON

In an action by the children of a half-brother of an intestate to establish their status and rights as next of kin, it appeared that the mother of the intestate in 1824 was deserted by her husband, and, believing him dead, in 1826 entered into marriage relations with another man, which continued until her death in 1833. The plaintiffs' father, the issue of this union, was born in 1829. The wife always remained unaware that her husband was not dead, and acted in good faith. He, in fact, survived her. All the events took place in the State of New York, where the parties were domiciled. The intestate died in Ontario, and his estate consisted entirely of personality :—

Held, that the question of the legitimacy of the plaintiffs' father and the right of succession of his descendants to the intestate's property, depended upon the law of the State of New York.

The expert evidence as to the law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, determined that by the law of the State of New York, referred to in the judgment, the plaintiffs' father was legitimate.;

ACTION for a declaration of the plaintiffs' status and rights as next of kin of one George W. Todd, who died intestate at Hamilton, Ontario, leaving a considerable fortune. The facts are stated in the judgment.

The action was tried before ANGLIN, J., without a jury, at Hamilton, on the 9th and 10th January, and further evidence was heard at Toronto on the 13th February, 1905.

E. E. A. DuVernet and *A. M. Lewis*, for the plaintiffs.

D'Arcy Tate for the defendant *Mary D. Vincent*.

A. W. Marquis, for the other defendants.

March 9. ANGLIN, J.:—The plaintiffs and the defendants other than the Trusts and Guarantee Company, administrators, are grand-children of one Philinda Ellison, whose matrimonial experiences give rise to the question raised by the defendants as to the legitimacy of the plaintiffs' father, Parley Hunt junior.

Philinda Ellison first married one Gideon Todd in or about the year 1820. By him she had issue Mary Ann Todd, the mother of the individual defendants, and George W. Todd, the

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intestate. In 1824 Gideon Todd deserted his wife, and caused a story to be published that he had been drowned. Believing him dead, Philinda Todd in 1826 entered into marriage relations with Parley Hunt senior, which continued till her death in 1833. Of this marriage Parley Hunt junior, was born in November, 1829, more than five years after Gideon Todd had deserted his wife, who always remained unaware that he was not in fact dead. He returned many years after to his former home. I have no doubt from a perusal of the evidence taken on commission that Philinda Ellison, throughout the period of her relations with Parley Hunt senior, acted in entire good faith and honestly believed that Gideon Todd was dead. The admissibility of much of this commission evidence may be questionable, but no objection to its reception was taken before me.

All the events which I have stated took place in the State of New York, where the parties were domiciled. The estate of George W. Todd consists entirely of personalty. The question of the legitimacy of Parley Hunt junior and the right of succession of his children to his half brother's property, depends, therefore, upon the law of the State of New York: *In re Goodman's Trusts* (1881), 17 Ch. D. 266, 292; *In re Fergusson's Will*, [1902] 1 Ch. 483; and according to that law it must be determined.

Expert evidence as to the law of the State of New York was given on behalf of both plaintiffs and defendants. Upon some points the expert witnesses agree. These present no difficulty. Upon others they differ to the degree of absolute contradiction, each expert resting his opinion upon the authority of decided cases to be found in the State reports. Upon this conflict of testimony I am driven to an examination of the authorities upon which the experts respectively rely. Reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analagous to those of a special jury, I am obliged to determine to the best of my ability what is in fact, upon such controverted points, the law which obtains in the State of New York.

In the first place the expert witnesses agree that by the law of New York an agreement between a man and woman presently to become husband and wife constitutes a valid marriage

without any ceremony whatever, and that such consent need not be given in presence of any witness, nor need it be evidenced in any particular form. It is also common ground that marriage will be presumed from cohabitation, reputation, acknowledgment of the parties, reception into the family, and other circumstances of a like character—the usual concomitants of the marriage state: *Hynes v. McDermott* (1883), 91 N.Y. 451; *Rose v. Clark* (1841), 8 Paige (Chy.) 574; *Caujolle v. Ferrie* (1861), 23 N.Y. 90; *Jackson v. Claw* (1820), 18 Johns. 346; *Fenton v. Reed* (1809), 4 Johns. 52.

There was no dissent by the expert witnesses from the proposition that, where the connection began under a contract of marriage supposed to be legal, though in fact void in consequence of a disability of one of the parties, a marriage after the removal of the disability may be presumed from acts of the parties evidencing recognition of each other as husband and wife and from continued matrimonial cohabitation and general reputation, and this though there had been no marked change in the character of the relations between them, and the invalidity of the marriage had remained unknown to them while both were living, the inference being of consent at the first moment when you find the parties able to enter into the contract: *Hynes v. McDermott*, 91 N.Y. 451; *Fenton v. Reed*, 4 Johns. 52. This doctrine is not unfamiliar, having been enunciated in *De Thoren v. Attorney-General* (1876), 1 App. Cas. 686, as prevailing in the case of Scotland, where marriage by consent followed by cohabitation is valid. Upon its applicability to the present case the experts do not agree.

By the statute 1 James I. ch. 2, it was enacted that a person marrying a second time whose husband or wife had been continually absent for seven years immediately preceding the second marriage and not known by such person to be living within that time, should not be guilty of bigamy. In 1788 a similar Act of the Legislature of the State of New York reduced the requisite period of absence to five years. This provision is still in force. The experts agree that it does not render a second marriage valid if the absent spouse be in fact alive. From the judgment in *Price v. Price* (1891), 124 N.Y.

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589, at p. 597, I take the following extract, which all the experts accept as a correct statement :—

“Such was the condition of the law when the Revised Statutes of this state were enacted, and experience having proved that the statute in respect to bigamy had induced the contraction of second marriages by persons having spouses who had been absent for five years and believed to be dead, which after the return of the absent husband or wife, were found to be void and the issue illegitimate, it was, for the purpose of alleviating some of these consequences enacted (2 R. S. 139.) ‘5. No second, or other subsequent, marriage, shall be contracted by any person during the life-time of any former husband or wife of such person, unless’ . . . and ‘Every marriage contract in violation of the provisions of this section, shall, except in the case provided for in the next section, be absolutely void.’ ‘6. If any person whose husband or wife shall have absented himself or herself, for a space of five successive years, without being known to such person to be living during that time, shall marry during the life-time of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority.’

“It was also provided (1 R.S. 142): ‘20. The chancellor (Supreme Court) may by a sentence of nullity, declare void the marriage contract for either of the following causes, existing at the time of the marriage ‘2. That the former husband or wife of one of the parties was living; and that the marriage of such former husband or wife was then in force . . .

‘23. When it shall appear and be so decreed, that such second marriage was contracted in good faith, and with the full belief of the parties, that the former husband or wife was dead, the issue of such marriage born or begotten before its nullity be declared, shall be entitled to succeed, in the same manner as legitimate children, to the real and personal estate of the parent who, at the time of the marriage, was competent to contract; and the issue so entitled shall be specified in the sentence of nullity.’”

The statutory provision contained in sec. 6 of ch. 139 above quoted, became law in 1830. . It is upon its construction and

effect that the members of the New York bar called as witnesses disagree.

Mr. Orcutt, an attorney in practice for twenty-five years, swears that this statute is retrospective and affects marriages contracted and issue born of such marriages before it became law. This position is controverted by Mr. E. Corey Townsend, a practitioner for twenty-one years, and by Mr. W. S. Jenkins, who has been in practice for twenty-five years, who both maintain that the statute only applies to marriages contracted after its enactment.

In support of his contention that, whatever its effect, the Act of 1830 applied to the relations between Parley Hunt senior and Philinda Todd and to their child Parley Hunt junior, born in November, 1829, Mr. Orcutt relied upon the decision of the Court of Appeals in *Brower v. Bowers* (1850), 1 Abb. Ct. App. Dec. 214. In that case Elizabeth Marks, held to have been the lawful wife of one Cromer, was deserted by him, and after he had been absent some seven or eight years, married one Kettleman, supposing Cromer to be dead, and by Kettleman had three children, the legitimacy of one of whom was in issue. After the death of Kettleman, Cromer had returned and lived one winter with his wife. The parties died before the Act of 1830 came into force. The Court held that the statute was retrospective in its operation, that it applied to the Kettleman marriage and "rendered it valid until it should be declared void by the decree of a court of competent authority, and that thereby Valentine Kettleman, issue of that marriage and father of three infants (who claimed as grand-nephews of the brother of Elizabeth Marks), was legitimated."

This decision, if it correctly expounds the law of the State of New York, settles in favour of the plaintiffs the question of the retroactivity of the statute of 1830. All three legal witnesses concur in stating that the decisions of the Court which disposed of this case bind all the Courts of the State of New York. But Messrs Townsend and Jenkins both dispute the authority of *Brower v. Bowers*. Mr. Townsend spoke of the portion of the judgment declaring the statute to be retroactive as "obiter dictum." An examination of the decision shews this position to be untenable. Mr. Jenkins and Mr. Townsend both

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questioned the authenticity of Abbott's reports. I have examined all the cases to which these gentlemen refer. A contrary view as to the retroactivity of the statute was expressed by Chancellor Walworth in *Valleau v. Valleau* (1836), 6 Paige (Chy.) 207, at p. 210. But nowhere do I find any judicial observation upon *Brower v. Bowers* which casts the slightest doubt upon its authority. It is referred to, without any adverse comment, in the judgment in *Price v. Price*, 124 N.Y. at p. 600. and *Bailey v. Bailey* (1887), 45 Hun 278, at p. 282. Upon cross-examination Mr. Jenkins admitted that *Brower v. Bowers* has never been overruled. I therefore find, upon the evidence before me, that that case correctly states the law of New York to be that the statute of 1830 is retrospective in its operation. In the view I take of the present action, this finding may not be material.

What then, if any, is its effect upon the relations of Philinda Todd and Parley Hunt senior? In their inception in 1826 clearly none; not because Gideon Todd was still alive (that is the very circumstance to which and to which only this legislation has application: *Nesbit v. Nesbit* (1885), 3 Demarest 329, at p. 336); but because the requisite period of five years had not then elapsed. These parties, it is admitted, went through a ceremony of marriage in 1826. They never intended to cohabit illicitly. The five years from her desertion by Gideon Todd expired, I have found upon the evidence, prior to the time in November, 1829, when Philinda Ellison gave birth to Parley Hunt junior. If it were proved that a marriage had taken between these parties during this interval, the Act of 1830 would apply to it. Should such a marriage by mutual consent be presumed?

I do not see how such a presumption can be made. The fact of the continued existence of Gideon Todd being established, there can be no presumption of his death. Nothing had occurred to remove or extinguish the impediment of the marriage to him up to the end of 1829. Though if there had been actual proof of a marriage in 1829, after the five years had expired, the statute of 1830, by its retrospective operation, might validate it, it is quite another thing in the absence of such evidence to presume that these parties did an act, which though

not criminal, by reason of the saving statute of 1788, would certainly have been, at that time, illegal. Nothing in the statute of 1830 compels or countenances a presumption so contrary to the fundamental principles of jurisprudence. It is only upon the cesser of the impediment, actual or presumed, that even the strong presumption in favour of marriage can prevail. It being therefore impossible to presume that a marriage took place between his parents in 1829, the statute of 1830 finds no subject of that date upon which it could operate, and it necessarily follows that Parley Hunt junior was born out of lawful wedlock and as an illegitimate child.

But if the effect of the statute of 1830 when it became law was, in the case of a person whose husband or wife had been absent for five successive years without being known to such person to be living during that time, to extinguish or neutralize the obstacle opposed to his or her marriage by the former marriage undissolved, and to render such a person capable of entering into a new marriage contract, may not and should not it be presumed that parties in the position occupied by Philinda Ellison and Parley Hunt senior, married *eo instanti* that the statute became law? Upon the authority of *De Thoren v. Attorney-General*, 1 App. Cas. 686, which Mr. Townsend accepted as correctly stating the law which obtains in the State of New York, in my opinion that presumption may and should be drawn. It is a presumption in favour of morality, legality, and legitimacy. It involves nothing which is at all irreconcilable with the actual facts in evidence.

While to hold valid the contract which it sets up may perhaps be objectionable and even shocking to minds trained to consider a marriage once contracted as always in force and the parties to it legally incapable of marrying again, until it is dissolved by death or divorce, there seems to be no good reason why such a contract should not be presumed in a State which by legislation validates if it does not encourage it. Nor is it surprising to find such a contract declared not void *ab initio* by a legislature which permits the remarriage of a person whose husband or wife has been finally sentenced to imprisonment for life, and further enacts that no pardon granted to any person sentenced to imprisonment for life in that state shall be deemed

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to restore such person to the rights of any previous marriage. (2 R.S. 138, secs. 5 and 7.)

It is as to the effect of the statute of 1830 that the expert witnesses entirely disagree. Mr. Orcutt's evidence is that the statute rendered a person, situated as Philinda Todd was when her husband had been absent for five years, competent to marry again; that a second marriage so contracted would be valid to all intents unless and until declared null by decree of a court of competent authority which can only be pronounced at the instance of one of the three principals and that the issue of such a marriage not so declared null is legitimate for all purposes. Mr. Townsend's testimony in substance was that in his opinion the statute of 1830 in nowise affects a marriage within its terms, or the issue of such marriage, until a decree of nullity is pronounced, and that then its sole effect is the partial legitimization of issue for which it provides, if the decree should find that the marriage was contracted in good faith. Mr. Jenkins's opinion was that while the statute "in name" declared such marriages to be not void, they in reality remained void as at common law, and only became voidable when by a decree of nullity pronounced by a competent court it was found that the marriage had been contracted in good faith. In support of their views the two latter gentlemen referred to the following New York cases: *O'Gara v. Eisenlohr* (1868), 38 N.Y. 296; *Williamson v. Parisien* (1815), 1 Johns.Ch. 389; *Valleau v. Valleau*, 6 Paige (Ch.) 207, 210; *Spicer v. Spicer* (1873), 16 Abb. P.R.N.S. 112; *Taylor v. Taylor* (1901-3), 63 App. Div. 341, 173 N.Y. 266; *Tracy v. Frey* (1904), 95 App. Div. 579; and to Schouler on Domestic Relations, sec. 21, and Bishop on Marriage and Divorce, sec. 970.

I have carefully examined all these authorities and find none of them directly in point except *Spicer v. Spicer*, 16 Abb. P.R.N.S. 112. In that case, decided in 1873 by the General Term of the City Court of Brooklyn (Reynolds and Nelson, JJ.), the opinion is expressed that "a wife, whose husband absents himself, for the space of five successive years, without being known to her to be living during that time, is incapable of contracting marriage, notwithstanding the statute; and a marriage so contracted, living the former husband or wife, is

not to be regarded as valid for any other purpose concerning property than that of preserving the inheritance of offspring thereof, from the competent parent." It is noteworthy that *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214, is not cited in the report of *Spicer v. Spicer*. The Court which decided this latter case is admittedly not competent to overrule or depart from decisions of the Court of Appeals. Some colour is lent to the contention of Messrs. Townsend and Jenkins by *Taylor v. Taylor*, 63 App. Div. 231, 173 N.Y. 266.

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But the opinion upon the effect of the statute of 1830 which is expressed in *Spicer v. Spicer* appears upon examination to be distinctly *obiter*, and, therefore, as Mr. Jenkins by the citation of several authorities sought to impress upon if not to apprise me, not binding as a decision. Moreover it is so irreconcilable with a large number of other reported decisions, of which I shall refer to some, that views as to the true construction and effect of the statute in question based upon it, appear to me to rest on a very shaky foundation. In *Gall v. Gall* (1889), 114 N.Y. 109, Vann, J., delivering the judgment of the Court of Appeals, says at p. 113: "The competency of Jerman to marry the plaintiff rested upon that provision of the Revised Statutes *which permits a man already married, to marry again*, provided his former wife shall have absented herself for the space of five successive years without being known to him to be living during that period." And at p. 120 he continues: "The section quoted seems to be based upon the probability that the absentee is dead, and is apparently designed to protect the person who, in good faith, acts upon the statute, from evil results if the absentee is actually living. The first marriage is suspended, or, as was held in *Griffin v. Banks*, 24 How. 213, it is 'placed in abeyance,' but it is not reinstated by the return of the absentee, because the second marriage becomes void only from the time that it is so declared by a competent court. Otherwise both marriages would be in force at the same time and, to this extent, polygamy would be sanctioned by law. The first marriage ceases to be binding until one of the three parties to the two marriages procures a decree pronouncing the second marriage void."

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In *Griffin v. Banks* (1862), 24 How. (P.R.) 213, apparently approved in *Gall v. Gall*, just referred to, Clerke, J., delivering the judgment of the Supreme Court in General Term, says, at p. 214-5: "The language of the statute is very general and positive, without any reservation or exception, express or implied; and yet it would apparently be at variance with the plainest principles of justice, that the first husband should be deprived of his marital rights—of his right to the enjoyment of the society of his wife and of his interest in her property, merely by her mistake, arising from an absence which, under many circumstances, he could not avoid, and which, indeed, may have originated in an endeavour to promote the common benefit of both. If the second marriage is to be upheld, the first ceases to have any validity; both, certainly, cannot co-exist. Under our law, and under that of all Christendom for many centuries, if not from the very origin of Christianity, no man shall have more than one wife, and no woman more than one husband, at the same time. Does the law, then, provide no redress for the husband who has been thus injured by the act of his wife, committed under a mistake? I think it does. It places the first marriage only in abeyance. It only temporarily suspends the rights of the first husband, unless, by his own neglect or acquiescence, he should waive or abandon them. The course pointed out by the Chancellor, in *Valleau v. Valleau* (6 Paige 207), is open to every husband or wife in similar circumstances. He says: 'The remedy of the former husband or wife, in such a case, is to file a bill, and proceed in the manner prescribed by the statute to annul the voidable marriage, and if the parties thereto continue to cohabit together, after a decree of nullity has been pronounced, the rightful husband or wife may then file a bill for a divorce on the ground of that adultery.' This is the obvious and the only practicable course; and McCullom, the first husband in this case, having omitted or neglected to resort to it, the second marriage continued in force, and after the death of McCullom, could not be disputed or invalidated by his representatives, or any other party. I hold, therefore, that the marriage of Bruce McKinney and Mrs. McCullom has the same force and effect as if, when it was solemnized, McCullom was not alive."

As pointed out by Mr. Orcutt, the reversal of this decision in (1868) 37 N.Y. 621 is upon another point, and does not affect its authority upon the operation of the statute now being considered. In *Price v. Price*, 124 N.Y. 589, Follett, C.J., delivering the judgment of the Court of Appeals, says at p. 598: "By these provisions such marriages ceased to be void, and became voidable;" and at p. 600 he refers to *Brower v. Bowers* and *Griffin v. Banks* as authoritative decisions. *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214, had decided that such a marriage as that now being considered was by the statute "rendered valid until it should be declared void by the decree of a court of competent authority" and that "the issue of that marriage . . . was legitimated" (p. 225.)

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In *Bailey v. Bailey*, 45 Hun 278, Pratt, J., delivering the judgment of the General Term of the Supreme Court (2nd Dept.), says at p. 282: "In such cases the issue of the second marriage is absolutely legitimate," citing *Brower v. Bowers*, *Price v. Price*, and *Griffin v. Banks*. See too *Circus v. Independent Order of Ahawas* (1900), 55 App. Div. 534, 536, and *Oram v. Oram* (1877), 3 Redfield 300, where the Surrogate says: "The case of *Spicer v. Spicer* (16 Abb. P.R.N.S. 112), tried in the City Court of Brooklyn, is cited as an authority shewing such second marriages to be void, if the first husband was actually living at the time, and the case of *Brower v. Bowers*, 1 Abb. Ct. App. Dec. 214, holds the opposite to be the law"—and he apparently proceeds upon the latter decision.

The contrary view expressed by Messrs. Townsend and Jenkins would qualify and restrict the general and positive language of sec. 6 of 2 R.S. ch. 139, by reading with that provision and as the sole purpose of its existence a section not collated with it but found in 1 R.S. ch. 142. This appears to be a forced and unnatural limitation of legislation intended to be remedial and containing neither reservation or exception.

I have no hesitation in concluding, therefore, that Mr. Orcutt's exposition of the effect of the statute of 1830 was sound when he stated that in a case to which it applies it confers the right to re-marry upon the party deserted: that it makes such person competent to marry; that it removes the disability

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resulting from the former marriage; and that a marriage within the purview of the statute is and remains absolutely valid, and the issue thereof legitimate, unless and until a decree has been pronounced by a competent court declaring it null. Any other conclusion, apart entirely from authority, appears to me to be based upon a fundamental misconception of voidability. But the authorities by which Mr. Orcutt supported his testimony render its acceptance imperative.

Deducing therefore from the continued cohabitation of Philinda Ellison and Parley Hunt senior, as man and wife, from 1830 to 1833, a presumption of their marriage by mutual consent upon the passing of the statute of 1830, and it being admitted that that marriage was never annulled, I find that it was and remained a valid marriage.

Though this does not render Parley Hunt junior, born in November, 1829, legitimate, it paves the way for that result. Parley Hunt junior, according to the evidence of Martha M. Hunt, his widow, and Medelia A. Dudley, his sister, died in 1896. On the 3rd May, 1895, the Legislature of the State of New York passed the following statute, chaptered 531 of the laws of that year:—

“Section 1. All illegitimate children, whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children. Provided, however, that vested interests or estates shall not be divested or affected by this Act.

2. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

3. This Act shall take effect immediately.”

There could be, in 1895, no vested interests in the estate of Geo. W. Todd, who did not die until 1903. *Nemo est hæres viventis*. The proviso in sec. 1, therefore, does not, for the purposes of this case, exclude Parley Hunt junior from the beneficial operation of the statute. Though illegitimate when born, the subsequent intermarriage of his parents in 1830 legitimatized him for all purposes. His issue can, therefore, claim through him as a half brother of the intestate George W. Todd.

Judgment will be entered declaring the plaintiffs to be of the next of kin of George W. Todd deceased and for payment to them of their costs of this action by the defendants other than the Trusts and Guarantee Company, who will have their costs as between solicitor and client out of the estate of the intestate.

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[DIVISIONAL COURT.]

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Broker—Purchase of Shares on Margin—Hypothecation by Brokers—Conversion—Bought Note—Account.

Where a broker is carrying stock on margin for a principal, it is not a conversion for him to hypothecate it to his bankers to secure his general indebtedness, provided he has at all times after the purchase a quantity of the stock equal to the amount purchased to deliver to the principal on demand and payment of the balance due.

Per ANGLIN, J.:—In this case such an hypothecation was a conversion, as it did not appear that the broker had the stock to answer such demand except by either obtaining the release of the hypothecated stock (as to which no special right was proved to have been reserved) or by purchasing other shares on the market. In taking an account the principal was entitled to credit for the market value of the stock on the day of such conversion.

Per ANGLIN, J., also:—A memorandum on a bought note that the broker reserves the right of pledging the shares, or raising money on them in any way convenient, when properly construed, only asserts the right to pledge the shares for the amount which the principal owes upon them.

THIS was an action by a firm of stockbrokers to recover from the defendant monies alleged to be due them on a balance of account under the circumstances stated in the judgment.

The action was tried before BOYD, C., at Toronto non-jury sittings on November 28th, 1904.

D. E. Thomson, K.C., and W. N. Tilley, for the plaintiffs.
C. Millar, for the defendant.

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December 8, 1904. BOYD, C.:—A person who employs a broker to act for him in the purchase of stocks is taken to be aware of the usual course of dealing in such cases and to authorize his agent to act in accordance therewith: *Sutton v. Tatham* (1839), 10 A. & E. 27, 29; *Grissell v. Bristowe* (1868), L.R. 3 C.P. 112.

The rule of law further appears to be that if the instructions are in such uncertain terms as to be capable of different meanings, and the agent *bond fide* adopts one which is in accordance with the ordinary course of business, the principal cannot afterwards disown the act and authority of his agent, because some other outcome was in his mind: *Ireland v. Livingston* (1872), L.R. 5 H.L. 395, 416.

Having acted under instructions the broker is entitled to be indemnified by the principal against loss or liability properly incurred by him as agent in the course of the particular transaction, and that even though it be of merely speculative character, so long as it does not trench on illegality: *Thacker v. Hardy* (1878), 4 Q.B.D. 685; *Forget v. Ostigny*, [1895] A.C. 318.

The plaintiffs in this case were instructed to buy stock (of named company) for the defendant. He was told that it could be purchased at 30½, and he said he was prepared to risk \$3,000, and take that in stock. He was told that would be margin for 300 shares of the stock—a ten point margin. This much defendant recollects.

Fraser, acting for the firm plaintiffs, says that the defendant wanted the stock to be carried on putting up a deposit, and Fraser then said that he would have to put up ten per cent. margin and maintain it. It is, however, doubtful whether the maintaining the margin was discussed between them.

The defendant says he understood he was giving \$3,000 to buy the stock, and that he would have no further liability. He says:—"I assumed that the stock was to be paid in full at that time." That is, as I take it, that his \$3,000 would buy so many shares out and out, without any advance being made on his account by the brokers. But, as he was informed that 300 shares were being dealt with on a ten per cent. margin, each share being for \$100 and purchasable at 30½, he must be taken

to have knowledge that his payment would not cover the price of the shares.

Now the order was in effect to acquire 300 shares, and the duty of the broker was to do what would be required to perfect that order, and this was done by his advancing other part of the price and obtaining the rest by replying with the Philadelphia broker through whom the purchase of the stock was concluded.

This advance of money on account of the defendant, though not in terms discussed, was justified by the law and practice of brokerage: *Bayley v. Wilkins* (1849), 7 C.B. 886.

The brokers thus came under obligations to carry the stock for the defendant, and were liable for and had expended the balance of the price over and above the \$3,000 payment made by the defendant.

I find no sufficient evidence of any discharge of the defendant from the obligation to save harmless the agents for the balance due on this account. There is no proof that the subsequent payment of \$1,800 by the defendant was taken in exoneration of his entire liability. Though he may not have been obliged to take such course, it was supplied in order, apparently, to give another chance of making something out of the venture.

The parties were at arms-length in December, 1902, and if the shares then sold by the plaintiff could be regarded as earmarked for the defendant, his liability would cease at that point, but the law appears to be recognized in this country as it is in the United States—that so long as the broker retains and has in hand shares sufficient in number and kind to answer what have been bought for the principal, no sale of like shares bought for the principal ends the contract: *Horton v. Morgan* (1859), 19 N.Y. 170; *Taussig v. Hart* (1874), 58 N.Y. 425; and *Clarkson v. Snider* (1885), 10 O.R. 561.

The brokers were not obliged to sell the stock, though default was made in keeping up the margin, until they received direction from the principal to sell, and none such was given here. They might have sold to protect themselves at an earlier stage, but no legal liability can be imputed to them because they abstained as they did—in the absence of evidence to shew want of good faith and ordinary caution: *Kerr v. Murton* (1904), 7 O.L.R. 751.

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The objection as to several orders being included in one contract at the start does not appear to be material as the transaction has worked out: *Beckhuson & Gibbs v. Hamblet*, [1900] 2 Q.B. 18 is answered by *Scott & Horton v. Godfrey*, [1901] 2 K.B. 726.

In the absence of any promise to pay a greater rate of interest than the statutory on money advanced for the defendant, I do not think that a greater rate should be allowed than the statutory five per cent., and that not compounded,—to this extent the account should be modified by the Registrar, and judgment go for the principal due and interest so computed with costs of action.

The defendant appealed to the Divisional Court, and the appeal was argued on January 24th, 1905, before FALCONBRIDGE, C.J.K.B., and BRITTON and ANGLIN, JJ.

C. Millar, for the defendant, contended that the plaintiffs had no right under the circumstances to pledge the stock as they had done: *Clarkson v. Snider*, 10 O.R. 561, 567-8; that it had not been proved that the bought note ever reached the defendant's hands; that it was a breach of trust to pledge the stock, not only for the unpaid balance, but also for the plaintiffs' own debt: *Lewis on Stocks and Bonds*, p. 173; that the 300 shares never were Conmee's, and never got into the plaintiffs' name: *Sutherland v. Cox* (1887), 15 A.R. 541, 24 C.L.J. 55; that the plaintiffs had no right to sell out the defendant's shares, and then appropriate shares of their own to the defendant; and that the defendant paid the \$1,800 on the distinct understanding that that should end his liability.

D. E. Thomson, K.C., and *W. N. Tilley*, for the plaintiffs, contended that the fact that a broker has stock of his own in a concern does not disqualify him from taking orders for customers to buy more stock in the same concern; that none of the shares were ear-marked; that the plaintiffs did all they were bound to do by keeping trace in their books of the parties for whom they were responsible for shares, and for how many: *Dos Passos on Stockbrokers*, p. 103; *Markham v. Jaudon* (1869), 41 N.Y. 235; that the plaintiffs had a clear right to pledge: *Dos Passos*, *ib.*,

pp. 141-3; that the defendant must be presumed to have known the usage of the stock exchange; that from beginning to end the plaintiffs always had sufficient of the stock on hand to answer their liability to the defendant and other shareholders; that it is not the usage either in Toronto, New York or Philadelphia to keep each purchaser's shares separate; that the defendant must be presumed to have received the statements shewing him what rate of interest was being charged; and must be held to have authorized the plaintiffs to do business for him on the ordinary terms in that respect: *Dos Passos, ib.*, at pp. 157-8.

Millar, in reply, contended that the matter of interest was governed here by our statutes; and cited *Cullum v. Hodges* (1900), 17 Times L.R. 21.

June 12. FALCONBRIDGE, C.J.:—The evidence of Messrs. Fraser and Tudhope is positive and clear that plaintiffs could at any time have made delivery of the stock to the defendant, notwithstanding the general hypothecation thereof. And this evidence is quite uncontradicted.

This defence is not suggested in the record and is an ingenious afterthought. Leave ought not now to be given to set it up.

I agree with my brother Britton's conclusions as to the proper disposition of this appeal.

BRITTON, J.:—This is an action brought by the plaintiffs against the defendant for money paid by the plaintiffs for the purchase at defendant's request of 300 shares of Lake Superior Consolidated Common Stock, and for interest on carrying that stock, and for brokerage or commission.

The case was tried by the Chancellor who gave judgment on December 8th last in favour of the plaintiffs for the amount claimed except that interest was allowed to the plaintiffs at only five per cent. instead of at the higher rate which plaintiffs say they paid or were entitled to charge.

From this judgment the defendant appeals, denying any liability, and in the alternative contending that, if any liability, it should be limited to the time of the sale of the stock in the

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hands of Chandler & Co., through whom plaintiffs purchased for defendant.

The plaintiffs ask that the judgment be varied respecting interest, and awarding interest at the higher rate as in the statement of claim.

The plaintiffs were brokers carrying on business at Toronto. The defendant employed them as brokers and did so of his own accord—not in any way solicited by plaintiffs—and not by reason of any representation or inducement of plaintiffs. The contract established by the evidence is that the plaintiffs would purchase and carry for the defendant 300 shares of the common stock of the Lake Superior Consolidated. The questions of fact which the defendant raises are two: 1st. That when he paid the \$3,000 on April 28th, 1902, he did so for the purpose of investing that amount in the stock mentioned, and that if the stock should appreciate he would get the benefit of it, and if the price went down he would lose his money, and the plaintiffs could protect themselves from loss by selling before the drop was sufficient to use up the \$3,000 paid in as a ten point margin; and 2nd. That when defendant subsequently paid the \$1,800 he did so upon the express agreement that this should be in full satisfaction of any claim the plaintiffs had in reference to this transaction.

The evidence is quite against the defendant upon such contention. If the defendant intended to risk only \$3,000 in this speculation he should in making an agreement or bargain, contrary to the ordinary course of a broker's business for a client, have done very differently from what he says he did in his first interview with Mr. Fraser at the plaintiffs' office.

The payment of the \$1,800 was made on September 25th, 1902, and it followed almost immediately after the letter written by the plaintiffs on the 16th of that month, which states: "We find on looking into your account that it is \$1,800 short of a fair margin." This stock purchase was the only matter of account between the parties.

If the contract is established then it became the duty of the plaintiffs to carry it out—they were bound to purchase and to carry so long as there was no default on the defendant's part—and until the plaintiffs should insist upon the defendant paying

for and accepting the stock—or until the defendant should instruct the plaintiffs to sell.

The relationship of broker and principal once established, the broker is entitled to indemnity so long as he carefully carries out the instructions of his principal.

Plaintiffs purchased the stock at apparently the best price for which it could be bought in the only market where the stock was regularly listed upon a stock exchange. The defendant could have had it at any time on paying the balance of the purchase price, or he could at any time have instructed the plaintiffs to sell and have closed the account at a profit or loss according to the date.

The purchase was on April 28th, 1902, at $30\frac{1}{2}$.

The price in May, 1902, rose to $34\frac{1}{2}$. It stood in May			
at.....	highest $34\frac{1}{2}$	lowest $28\frac{1}{2}$	
June.....	" $30\frac{1}{2}$	" $28\frac{1}{2}$	
July.....	" $29\frac{1}{2}$	" $25\frac{1}{2}$	
Sept.....	" $26\frac{1}{2}$	" $23\frac{1}{2}$	

And then continued to decline until in July, 1903, when the price was highest $4\frac{1}{2}$ lowest $1\frac{1}{2}$

Plaintiffs sold on July 10th for $2\frac{8}{10}$.

In September, 1902, had the defendant instead of paying in the further sum of \$1,800 instructed the plaintiffs to sell, his loss even at a sale at the lowest point for that month would have been only $6\frac{1}{2}$ points over and above the interest and commission. The defendant did not ask the plaintiffs' advice. He does not complain of any negligence on the plaintiffs' part in buying or selling.

I do not think there was any duty cast upon the plaintiffs of disclosing that they or that any member of the plaintiffs' firm had entered into negotiations for securing, or had actually secured, an option on any quantity of this stock.

As a matter of fact, the defendant says he heard that Mr. Ames had purchased this Lake Superior Consolidated Stock and was advising others to purchase; so the defendant was, without any representation by the plaintiffs or any of them, made aware that the plaintiffs owned if they did own some of this stock.

There seems to be no evidence of any bad faith on the plaintiffs' part, or of any juggling with the market to enhance or depreciate this stock.

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So far as the market price was concerned the defendant could have informed himself, and in the absence of any enquiry or attempt to get information from any source or of advising with or instructing the plaintiffs, he can hardly blame the plaintiffs for holding until July, 1903, or for selling then.

The questions of law that arise are (1), as to the right of plaintiffs to hypothecate the stock for advances made to them.

The authorities cited by the Chancellor seem to entirely cover this, that there is the right of hypothecation.

(2). Were the shares sold by Chandler & Co. in December defendant's shares so that he is entitled to call that a conversion and to compel the plaintiffs to account as of that date?

That point is dealt with by Cameron, C.J., in *Clarkson v. Snider*, 10 O.R. 568, as follows:—

"It is quite true stock, so to speak, is not ear-marked, one share being as good as another, and it is not necessary that the identical shares bought for a client shall be kept separate from other shares to be delivered when required, by the client. To so hold would be holding against common sense, and imposing for no good trouble upon the broker. But while this is so, it does not interfere with the rule of law regulating the duty of an agent towards the principal which requires him to have his principal's property so as to be ready for delivery to him, when demanded, on payment of any lien he may have thereon against his principal." Then the learned Chief Justice referred to, and made extracts from Dos Passos on Stock Brokers, p. 143, to the same effect.

Plaintiffs say they had at all times, after the purchase of these 300 shares, that quantity of this stock to deliver to the defendant had he asked for it and paid the balance. It is not a question of after acquired stock.

The case of *Clarkson v. Snider* above cited is authority for the proposition that where there is by the broker hypothecation of all the stock to secure advances upon it which have no reference to the advances by the broker to the client, and without reference to the rights of the client, such hypothecation is equivalent to an absolute transfer, and amounts to a conversion, but upon the evidence there was not, in this case,

any hypothecation without reference to the rights of the defendant. It is said by the witnesses, Fraser and Tudhope, that the plaintiffs always had the shares on hand for the defendant. The plaintiffs always had in mind that in dealing with this stock it was necessary that they should retain in their vaults or in their control enough to satisfy the demand of any client for whom any of this stock was purchased. They say they did so deal with it, and did so control the stock, notwithstanding any hypothecation of it. As evidence of this the plaintiffs did not require to purchase any stock to sell, nominally, as the defendant's stock, but they sold as the defendant's stock which they controlled from the time of the purchase for the defendant. No one is called to dispute the positive evidence given that the plaintiffs were always ready to deliver—and the defendant does not in his statement of defence rely upon alleged hypothecation as freeing him from liability, nor was this point put forward at the time.

There seems to me no doubt whatever that the defendant could at any time after the purchase have had delivery of the stock upon payment of the balance.

Part of the evidence upon this point is Fraser's :

Q. Now when these sales were made in December, 1902, of part of the stock in Chandler's hands did you still have stock on hand for Mr. Conmee ? A. Yes.

Q. And you continued to ? A. Yes.

Q. Were you in a position to make the transfer ? A. We could always have delivered the stock on payment.

Q. But you regarded that you were bound to have somewhere enough stock to answer him and any person else whose stock you were carrying ? A. Yes.

45. Q. Can you say where you acquired the shares that were sold to Toland in July, 1903 ? A. We had them in our vaults.

47. Q. Now, what do you say to Conmee's stock ; did you always have it on hand somewhere for delivery ? A. We could always make delivery to him of it.

Q. Without buying it ? A. Without buying it.

H. R. Tudhope :—The Chancellor. You say, We always had enough stock to answer our obligations ? A. Yes.

Q. Apart from your individual stock ? A. Yes.

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Notwithstanding all that Mr. Tudhope said in the course of examination, cross-examination and re-examination, at great length, about pledging the stock, he repeats, that the plaintiffs had the stock ready to deliver to the defendant at any time on his paying the balance owing upon it.

It is quite true that the precise arrangement between the plaintiffs and their bankers was not shewn.

That the stock, between the plaintiffs and their bankers, was liable for the entire amount of the plaintiffs' indebtedness, if that be the fact, and that the plaintiffs' indebtedness to their bankers was more than the value of the stock, does not necessarily negative the evidence that the plaintiffs were also able and ready to deliver the stock to the defendant. It appears to me that, upon the evidence, the plaintiffs never parted with so as to prejudice the defendant, and always had such control of a sufficient amount of this stock as to deliver to the defendant upon demand, and upon payment of balance due by him.

I am of opinion that in strict law the plaintiffs are not entitled to charge the quarter per cent. commission on sale of the stock. The stock was not sold under instructions from the defendant. The plaintiffs are entitled to what they paid in Philadelphia—but to no profit on that sale—sold for their own benefit. The plaintiffs, apparently, paid $\frac{1}{8}$ = \$1875. There should be a credit to the defendant of \$56.25 and subject to this, the appeal should be dismissed with costs.

The plaintiffs have cross appealed for interest asking a higher rate than that allowed by the Chancellor.

In the absence of any definite agreement as to the rate of interest, and as it is not clear from the evidence just what rate the plaintiffs paid for the money with which to carry this stock at the time it was being carried for the defendant, I think the finding of the Chancellor cannot be disturbed. The cross appeal should be dismissed with costs.

ANGLIN, J.:—With much regret I find myself unable to agree in the conclusions reached by the other members of the Court.

The defendant appeals from the judgment of the Chancellor, delivered on December 8th, 1904, holding him liable for the balance due to the plaintiffs upon 300 shares of the Consolidated

Lake Superior Stock which the plaintiffs had purchased for him as his brokers. This stock was bought on April 28th, 1902. Its price was then $.30\frac{1}{2}$ and the defendant gave his cheque for \$3,000 on account of the purchase. The purchase was made upon "margin," the plaintiffs undertaking to provide the requisite balance of \$6,150, the defendant, to protect them in "carrying" his stock, in his turn agreeing to maintain in their hands his 10 point "margin."

Upon the evidence it is quite impossible that the defendant should succeed upon any of the questions of fact determined against him. The findings of the learned Chancellor are fully borne out by the testimony. The plaintiffs caused 300 shares of Consolidated Lake Superior Stock to be purchased in due course for the defendant. He became liable as the market price of his stock declined to protect his interest in it by paying to the plaintiffs from time to time sums equal to the depreciation in value of his stock signified by such decline. Called upon many times by the plaintiffs for further "margin," the defendant ultimately paid them \$1,800. This payment was made upon the assumption that the plaintiffs were still "carrying" this stock for the defendant and that nothing had occurred to relieve him from his liability to protect them in regard to it. The defendant's statement that upon payment of the sum of \$1,800 the plaintiffs agreed to take the stock off his hands and relieve him from all further liability in respect of it finds no support in any testimony except his own, which, on this point, the learned trial Judge refused to credit, is inconsistent with the circumstances existing at the time the payment was made, and is in direct conflict with other evidence. The market price of the Consolidated Lake Superior continuing to decline and the defendant failing to respond to demands for further "margin," the plaintiffs, in July, 1903, caused what they allege to have been the defendant's shares to be sold on the Philadelphia market for \$843.75. After crediting him with this amount, the plaintiffs claim that the defendant still owes them about \$4,000 on account of the transaction.

Unless the plaintiffs have by special contract with the defendant secured for themselves greater rights than those ordinarily incident to the relation borne by a broker to his

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customer, before they can recover in this action they must shew that they held the defendant's stock ready for delivery to him on payment of the balance due to them, until the exercise of their undoubted right to sell his stock, if so held, for default in maintaining in their hands the stipulated "margin," by replenishing it if diminished, or replacing it when exhausted, upon demand duly made.

It is true that stock is not ear-marked and that "it is not necessary that the identical shares bought for a client shall be kept separate from other shares. . . . But while that is so, it does not interfere with the rule of law regulating the duty of an agent towards his principal, which requires him to have his principal's property so as to be ready for delivery to him when demanded, on payment of any claim he may have thereon against his principal:" *Clarkson v. Snider*, 10 O.R. 561, at p. 568. The broker's contract is that he will keep "on hand" shares similar to those he has "purchased for his client:" S.C., at p. 569. The stock on hand by the broker should be sufficient to answer all demands upon him, and not only the stock of the particular customer, unless the stock on hand be the specific stock of that customer: *Jones on Pledges*, secs. 509, 511. "The use which the pledgee makes of the stock must be consistent with the general rights of the pledgor and his ultimate right to redeem:" *Mara v. Cox* (1884), 6 O.R. 339, 387. Brokers clearly have not the right to sell the stock of their customer, except for default in providing margin according to his undertaking. They may not substitute the security of their personal liability for that of the shares to which the customer is entitled: *Mara v. Cox, ubi supra*. May they for their own purposes pledge their customer's stock alone or with other securities for the payment of a loan or loans larger in amount than the sum payable to them by their customer?

It is said to be only reasonable that the brokers should have power to repledge a customer's stock pledged to them for the amount they may have themselves to borrow to enable them to carry such stock, i.e., for the balance of the purchase money over the margin deposited, upon payment of which the customer is entitled to claim his shares. It may be that the law implies

such a right on the part of the brokers as an incident of dealings of this kind with a customer. That I am not now concerned to deny. But that the brokers are, without special agreement authorizing it, entitled to hypothecate their customer's stock to secure their own general indebtedness, or any amount greater than that for which they have themselves a lien upon that stock, is a proposition entirely different, and, in my opinion, clearly indefensible: *Clarkson v. Snider*, 10 O.R. 561.

The defendant's stock was bought on April 28th, 1902. The plaintiffs profess to have sold it on July 10th, 1903. Edward D. Fraser, a member of the plaintiffs' firm, says, in his evidence, that in pledging stocks for advances to themselves the plaintiffs did not keep the stock of one customer separate from that of another. H. R. Tudhope, another member of the plaintiffs' firm, gives this evidence: .

" Q. You did not have at all times stock on hand of Consolidated Lake Superior? A. In our vault?

" Q. Yes. A. If we did not have it in our vault we were carrying the stock with lenders.

" Q. I am talking of what was in your vault? A. I really do not know because I will have to consult the stock list, and you will have to give me a special date.

" Q. I am asking you whether from the time when he bought on April 28th, 1902, to July 10th, 1903, did you have free certificates in your vault for the amount of his shares? A. At all times?

" Q. Yes. A. I do not suppose we had, but we were always carrying enough stock at the banks to deliver that stock to Conmee.

" Q. And the stock at the banks was liable not only for the amount unpaid on these particular shares, but was liable for your indebtedness to the bank? A. Yes.

" Q. And from June onward of 1903 you were unable to pay your indebtedness? A. That is right.

" Q. And you had pledged this stock wherever it was pledged. It was pledged for your indebtedness to the bank or lender? A. No, not for other indebtedness.

" Q. The stock was liable for your total indebtedness to that lender? That is right? A. That is right—yes.

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" Q. And your indebtedness to these various lenders was very large? A. I do not know with whom we were carrying that Consolidated Lake Superior. It may have been very small with the lender.

" Q. But with most of these lenders it was large? A. With some lenders it was large, and with some small.

" Q. Do you not know as a matter of fact it was much more than you could pay at the time you suspended? I do not mean on Consolidated Lake Superior. I mean your total indebtedness was very large? A. Yes.

" Q. And this stock stood as security for your total indebtedness to each lender? A. Just to the lender with whom that stock was pledged.

And again:—

" Q. You have a marginal note here saying that on these dates, December 4th, 1902, and January 6th, 1903, all your stock was pledged? A. Yes.

" Q. That is the marginal note, my lord. Now when my learned friend said to you that the stock was under your control, and it was pledged to these various people, the pledgees had it for your indebtedness to them? That is the way you mean it was under your control? A. It was included in our loan with the lenders."

Although perhaps not as explicit as might be desired, or as might readily have been obtained, this evidence makes it reasonably clear that the defendant's stock though not ear-marked, was, while the plaintiffs were supposed to be carrying it for him, pledged with other stock held by them to lenders for advances not restricted in amount to the balance due from the defendant upon his stock and made without reference to the rights of the defendant. I can find no evidence of any arrangement made by the brokers entitling them to demand a release of the defendant's stock on payment to their lenders of a sum equal to the balance due from Conmee to them. I am unable to infer merely because the plaintiffs are brokers that their general loans were subject to this term or condition. In the absence of such an arrangement the plaintiffs' lender might refuse to deliver up this stock except upon payment of his whole claim against them.

He might, at least, exact payment of a sum equal to its full market value as a condition of releasing it. He might, indeed, upon default on the part of the broker in meeting some obligation wholly disconnected with the defendant or his stock, have sold such stock to satisfy his banker's lien. It is obvious that all this involves a very serious interference with the essential right of the customer to have his shares held in readiness for delivery upon payment of the balance due by him to the broker upon them. Between such a hypothecation and an absolute transfer there is no difference in principle. Both involve a conversion of the client's stock: *Clarkson v. Snider*, 10 O.R. 561, at pp. 567-8.

It is true that the plaintiffs allege that they were able and ready at any time to make delivery to the defendant upon payment. But this is nothing more than an assertion of ability and readiness to procure stock to meet the defendant's demand either by obtaining the release of hypothecated stock or by purchasing other shares on the market. This is not the full obligation assumed by the broker: *Sutherland v. Cox* (1884), 6 O.R. 505, 524.

The statement of the brokers that they had at all times under pledge with their bankers Consolidated Lake Superior Stock with which they could have met any demand that the defendant might have made for delivery of his shares does not in my view justify an inference that the brokers had any arrangement, express or implied, with their lenders or pledgees, entitling them to a release of this stock upon payment to such pledgees of the amount due by the defendant to the brokers. In the absence of such an arrangement the pledge of the defendant's stock for general indebtedness of the plaintiffs must, I think, be deemed a conversion whether the plaintiffs were or were not at all times in a position, by paying that indebtedness, to redeem such stock. The effect upon the client's rights of the hypothecation of his stock for the general indebtedness of the brokers cannot be contingent upon their ability to meet that indebtedness, upon which, in the absence of any special agreement with the pledgees to the contrary, the legal right to a release of such stock would depend. Neither can the plaintiffs justify their dealings with the defendant's stock, by stating

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that, although they had not reserved any legal right to obtain the release of that stock upon payment to their pledgees of the sum due by the defendant to themselves, they know that they could at any time have procured its release upon these terms. The defendant is entitled to something more certain. His right to delivery of his stock upon payment of the balance due to the brokers must be definitely and legally secured. That right the brokers must preserve by special agreement with their pledgees, if indeed they may in any case, without his sanction, pledge for their general indebtedness, their client's stock which they have undertaken to carry. Of such an agreement with the plaintiffs' pledgees I can, as above stated, in this case find no evidence.

Their undertaking to carry stock "on margin" for the defendant not conferring upon them the right to deal with his stock as they have done, the plaintiffs, to establish such right, are driven to rely upon an alleged special provision of their contract with him.

It is clear that this special provision was not a term of the original contract entered into by the defendant. Mr. Fraser, the member of the plaintiffs' firm, who took the defendant's order, says nothing of this kind was mentioned. The rights which it is said to confer are not incidents which the law attaches to an order by a customer to his brokers to purchase stock, or to the brokers' engagement to carry such stock on "margin." They must therefore be the subject of a special bargain between the brokers and the customer, and the former, to whose benefit it would enure, must establish that such a bargain was made. There is no evidence upon which it can be held that this onus has been discharged.

It is alleged by the plaintiffs that a bought note was sent to the defendant, upon the face of which, in the lower left corner, was printed in clear type the following memorandum: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." Mr. Conmee swears that this note never reached him. His statement is necessarily uncontradicted. He suggests adequate reasons for the belief that, though it were duly mailed, this communication might not have come to his hands. The evidence

of mailing is far from satisfactory, the plaintiffs' clerk admitting that he has no recollection of having mailed a bought note to Mr. Conmee. It is impossible upon such evidence to hold, in the teeth of Mr. Conmee's denial, that he received this bought note. There is no finding upon this point by the learned Chancellor, whose attention does not appear to have been directed to this aspect of the case, as his judgment does not even allude to these matters.

There is no evidence that the fact that the plaintiffs asserted this special provision to be a term of their contract with Conmee was ever in any other way brought to his attention. If the bought note had reached the defendant, it is by no means certain that he would have read the memorandum in its lower left hand corner. The plaintiffs have in my opinion entirely failed to establish that the defendant was at any time aware that the plaintiffs regarded this special term as the basis of their contract with him. There is no evidence which would justify a finding that he had such notice of it that from his conduct we might infer an acquiescence such as would estop him from denying to the plaintiffs whatever rights the language of this provision, upon any fair and reasonable construction of it, would have informed him they might claim under it.

But, were the plaintiffs in a position to ask us to treat this term as binding upon the defendant, is it sufficiently clear and explicit to authorize them to deal with his stock held by them in the manner in which they did? Rather should it not be restricted to an authority to pledge the customer's stock to the amount which he owed upon it and which the brokers, if not advancing it from their own funds, required to raise to enable them to carry such stock?

The language is that of the brokers. Before this provision can in their favour be construed to confer upon them the right to deal with a client's stock in their hands in a manner tantamount to converting it to their own use, the right to use it for purposes in which the client may have no interest and the right so to deal with it that, without any default on his part, the client may lose his entire investment,—powers almost inconsistent with and destructive of any right of property which the client may have in this stock—the Court must be satisfied that its language

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unequivocally expresses the reservation of such rights and would, upon being brought to his notice, convey to the client, with reasonable certainty, their nature and extent. I do not so read this provision. It is true that the brokers thereby assert a right to pledge or raise money upon such stock "in any way convenient" to them; but this is quite consistent with the client understanding that the amount to be raised should be restricted to that which he owes upon the stock and that it should be raised for the purpose of enabling the brokers to carry that stock, and in such a manner that the right of the client to have his stock held in readiness for delivery upon payment to the brokers should in nowise be interfered with. It is, in my opinion, quite probable that such would be the limited character of the powers which a perusal of the language of this special term would lead a customer to believe his broker intended by it to reserve. To secure the vastly more extensive rights which they must assert to be theirs in order to maintain their claim in this action the brokers should, in my view, have used language more explicit, the purport of which there could be no room to question. They should have stipulated not only for power to pledge and to raise money, in any way convenient to themselves, but for the right to pledge for any amount they please, and to raise money for purposes of their own business entirely disconnected with their obligations to the defendant, or his to them. This they have not done in language sufficiently clear and unmistakeable to have enabled me to say that such is the only fair and reasonable interpretation which the defendant could have put upon it, had I been satisfied that he should be charged with notice of it.

It follows that when they pledged the defendant's stock for their general indebtedness the plaintiffs, in fact, wrongfully converted it to their own use. It is the customer's right, in lieu of demanding present delivery of the stock or payment at its present market value, to compel the brokers to account for the market value of the stock at the time of its conversion. When the plaintiffs converted his stock to their own use the defendant became entitled to elect to treat that stock as theirs, and to hold them his debtors for its value at that time. That right of election he has never exercised. He never knew the facts which

gave it to him. Ignorant of its existence, he cannot be deemed to have waived it. Ignorant of the plaintiffs' breach of duty, he cannot be said to have ratified, or condoned it.

The plaintiffs cannot bind him by the subsequent steps they took. If the defendant elects (as he may now do, and as we may assume he will) to treat his stock as converted by the plaintiffs when they so pledged it, the subsequent sale, made upon the plaintiffs' instructions, was a sale not of the defendant's stock, but of what, at the defendant's option, is to be deemed their own property.

The evidence does not disclose when the stock in question was first pledged for the general indebtedness of the plaintiffs, nor what was then its market value. There should be a reference to the Master in Ordinary to ascertain the facts unless the parties can agree upon them. The plaintiffs are entitled to credit for the amount which they advanced to purchase the stock bought for the defendant with interest at five per cent. to the date at which they first wrongfully pledged it. The defendant must have credit for the sum of \$1,800, with interest upon that sum at five per cent. from the date at which he paid it, and for the market value of the stock at the date of its conversion.

The defendant did not, upon his pleadings, raise the defence upon which he is, in my opinion, entitled to succeed to the extent above indicated. From the judgment delivered by the learned Chancellor I would infer that it was not presented in argument before him. The defendant should, therefore, be relieved only upon proper terms as to costs.

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[DIVISIONAL COURT.]

D. C. PHILLIPS V. THE CORPORATION OF THE CITY OF BELLEVILLE.

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June 10.

Appeal—Divisional Court—Motion to Quash—Acceptance and Adoption of Judgment—Payment of Money as Directed.

In an action for an injunction against a municipal corporation to restrain a sale of lands to one C. and to compel it to sell and convey the lands to the plaintiff, on the ground that his was the highest tender therefor, both plaintiff and C. having paid deposits, the trial Judge held that the plaintiff was entitled to an injunction restraining the sale to C., but that the corporation could not be compelled to sell to him and both the deposits were directed to be returned.

The corporation, having returned the deposits, appealed to a Divisional Court and the plaintiff moved to quash the appeal on the ground that the corporation had accepted and acted on the judgment and that C. would not now carry out the purchase:—

Held, that the mere payment of money, as directed by a judgment, is not a bar to an appeal from that judgment by the party making such payment: and mere obedience to a judgment, not such as to signify conclusive acceptance of its terms, does not destroy the right of appeal: that here the repayments of the deposits involved nothing inconsistent with the relief, which the corporation sought upon its pending appeal and in no wise signified a conclusive submission to the judgment appealed from.

Held, also, that no change in attitude upon C.'s part at this stage of the case could debar his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they alleged had been pronounced in error.

THIS was a motion to quash an appeal to a Divisional Court from a judgment of Magee, J., at the trial, in an action against the corporation of the city of Belleville, to compel them to sell to the plaintiff certain lands purchased by them at a tax sale pursuant to R.S.O. 1897, ch. 224, sec. 184 (3).

It appeared that the corporation had called for tenders for the lands and the plaintiff and the defendant, Joseph Caldwell, had both tendered, and made deposits with their tenders.

The plaintiff alleged that his tender was the highest, but that the defendants, the corporation, would not sell to him, and intended selling to Caldwell.

The action was tried at Belleville on the 22nd of November, 1904, before Street, J., without a jury, who dismissed it.

The plaintiff appealed to a Divisional Court, and the appeal was argued on the 17th of January, 1905, before Boyd, C., MacMahon and Meredith, JJ., and judgment was subsequently given setting aside the judgment and granting a new trial upon the grounds reported: 9 O.L.R. 732.

The action then came on for the new trial at Belleville on the 2nd of May, 1905, before Magee, J., without a jury, who held that there was no contract binding on the corporation to sell to either the plaintiff or Caldwell, but granted an injunction restraining the corporation from selling to Caldwell pursuant to any negotiations had prior to the action, and directed the return of the money deposited on both tenders. The mayor, who held the plaintiff's deposit, and the treasurer, who held Caldwell's, returned them without any resolution or by-law of the council.

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From this judgment the defendants appealed to a Divisional Court, and on the appeal coming on for argument on the 5th of June before MEREDITH, C.J. C.P., BRITTON and ANGLIN, JJ.

E. D. Armour, K.C., for the plaintiff, moved to quash the appeal on the ground that the defendants, the corporation, had accepted the judgment of the trial judge and acted on it in returning the money to both the plaintiff and the defendant Caldwell, and that in any event it had been intimated that Caldwell would not now purchase the lands. He referred to *Keith v. Keith* (1877), 25 Gr. 110; *Videan v. Westover* (1897), 29 O.R. 1; *International Wrecking Co. v. Lobb* (1887), 12 P.R. 207; *Pierce v. Palmer* (1887), *ib.* 308; *Re Smart Infants* (1888), *ib.* 635.

W.C. Mikel, for the defendant corporation, contended that the parts of the judgment directing the injunction and the return of the money were severable, and that the corporation might appeal as to the one and accept the other. The money of one, and perhaps both, had to be returned. If the plaintiff established a contract Caldwell's money had to be returned, and if his action was dismissed he had to get his own money back. In any event the acts of the mayor and treasurer, who returned the monies, could not bind the corporation without a resolution or by-law so as to waive an appeal: *Clarke v. Creighton* (1890), 14 P.R. 100; *La Societe Canadienne-Francaise de Construction de Montreal v. Daveling* (1891), 20 S.C.R. 449.

Armour, in reply.

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June 10. ANGLIN, J.:—The plaintiff moves to quash the appeal of the defendants, the corporation of the city of Belleville, to this Court from the judgment of Magee, J., pronounced on the 2nd of May, 1905 (6 O.W.R. 1). The plaintiff sued to restrain the defendant corporation from selling to their co-defendant, Caldwell, for a sum less than that offered by the plaintiff, lands acquired by the corporation when offered for sale for arrears of taxes. The plaintiff and defendant Caldwell had each, upon tendering for these lands, deposited a sum of money with the defendant corporation. By the judgment granting the injunction sought by the plaintiff the learned trial Judge directed the return of such moneys to both the plaintiff and the defendant Caldwell, holding that there was no contract to sell the lands in question to either of them binding upon the defendant corporation. With this latter portion of the judgment the defendant corporation has complied. It is further stated that the defendant Caldwell has intimated his intention to decline to purchase these lands from his co-defendants.

The plaintiff's motion to quash the pending appeal is based upon two grounds: (a) That by the payments to Phillips and Caldwell the defendant corporation has accepted or submitted to the judgment of Mr. Justice Magee to an extent which precludes its right to appeal; (b) that no effective remedy can be given upon such appeal in view of the position taken by Caldwell.

Upon the first ground the authorities seem clear that mere payment of money, as directed by a judgment, is not a bar to an appeal from that judgment by the party making such payment. In *Pierce v. Palmer*, 12 P.R. 308, where, in lieu of complying with the direction of an order, the defendant sought and obtained an enlargement of the time fixed by such order for compliance and then launched an appeal from the order, Mr. Justice Proudfoot, in delivering the judgment of the Divisional Court dismissing the appeal, says, at p. 312: "The defendant has not done what he was required to do by the order. He has not paid the money into Court. Had he done so, then *Masterman v. Price* would probably have given him the right of appeal. But here, treating this order as perfectly regular,

and under no compulsion from its terms, he applies to extend the time for payment."

A party may not so act upon a judgment that to appeal from it would be futile. He may not, as in *Pierce v. Palmer*, take a step which necessarily implies his acquiescence in the very provision from which he would appeal and thereafter assert a right to so appeal. Neither may he take advantage of those terms of a judgment which are in his own favour and yet maintain an appeal from other terms of the same judgment which he deems adverse. The cases cited by the learned counsel for the plaintiff appear to fall under one or other of these heads. But mere obedience to a judgment, not such as should be held to signify conclusive acceptance of its terms, does not destroy the right of appeal: *Masterman v. Price* (1847), 1 C. P. Cooper's Reps. 358, and cases in note; *Daniels' Chy. Pr.*, 7th ed., p. 1048.

The repayments to Phillips and Caldwell involve nothing inconsistent with the relief which the defendant corporation seeks upon its pending appeal. They in no wise signify a conclusive submission to the judgment appealed from. Upon this ground the motion therefore fails.

I am unable to find upon the material anything to support the contention that, if the existing injunction is removed, and the appellants are declared to be at liberty to carry out the sale they were negotiating with him, the defendant Caldwell may not purchase from them the lands in question. But even were such the case, no change in attitude upon Caldwell's part at this stage of the case can debar his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error.

The motion should, in my opinion, be dismissed with costs to be costs in the cause to the appellant in the present appeal, and to be paid by the plaintiff in any event thereof.

MEREDITH, C.J., and BRITTON, J., concurred.

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[IN THE COURT OF APPEAL.]

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V.

THE CORPORATION OF THE TOWNSHIP OF COLLINGWOOD.

Injunction—Water and Water Courses—Culvert—Drain—Revocable License therefor—Damages—Easement—Prescription.

The owner of a farm consented to the water, which came thorough a culvert, being carried off by means of a drain, which he himself dug, through the corner of the farm, into a ravine. No written agreement was entered into therefor, nor was there any expenditure of public money thereon, nor any consideration given for its use :—

Held, that a revocable license merely was constituted, which the plaintiff, claiming through such owner, was entitled to revoke ; and even if a valid agreement with such owner were established, it would not be binding on the plaintiff, for no notice or knowledge thereof was proved, knowledge merely of the existence of the culvert and drain not being sufficient.

Held, also, that the plaintiff was entitled to an injunction, the damages allowed him—\$100—being under the circumstances substantial, while the cause was a recurring one, which, if allowed to continue, might ripen into an easement by prescription.

THIS was an action by a farmer against the township of Collingwood for damages alleged to have been caused to the plaintiff's farm and beehives, by reason of the discharge of waters thereupon from a highway, known as the Mountain road, and for an injunction restraining further discharges.

The matters in question were referred for hearing and determination to the senior Judge of the county of Grey, who, after viewing the premises, and taking a great deal of evidence, made his report finding the plaintiff entitled to \$100 damages, and to an injunction against further discharge from the highway upon the plaintiff's lands.

Upon appeal by the defendants the report was confirmed by the Chief Justice of the King's Bench ; and, on motion for judgment, the defendants were ordered to pay to the plaintiff the sum of \$100 damages and the costs of the action on the county court scale. The defendants were also restrained and enjoined from accumulating and discharging waters, or permitting same to be accumulated and discharged from the Mountain road upon plaintiff's lands.

The defendants did not appeal from the finding as to damages, nor the order for payment thereof. They limited their appeal to the award of the injunction, contending that an injunction should not have been granted, or, at all events, it should have been limited so as not to interfere with the use by the defendants of certain culverts constructed at different points of the Mountain road.

The additional facts, so far as material, are set out in the judgment.

On April 25th, 1905, the appeal was heard before MOSS, C.J.O., OSLER, and MACLAREN, JJ.A.

A. B. Aylesworth, K.C., and *T. H. Dyre*, for the appellants. The referee found that the only damage that the plaintiff had sustained was to the road field, but the engineer shews that no more water was brought on to it than came there before the culvert was made. In any event, if any damage was sustained, it was by reason of the unusual and excessive rainfall amounting to *vis major*. The culvert was made with the authority and consent of the plaintiff's predecessor in title, who assisted in the work, and dug the drain on his own premises, and it has been acquiesced in by the plaintiff. The easement which the defendants had was apparent, of which the plaintiff had notice: *Jones on Prescription*, sec. 225; *Israel v. Leith* (1890), 20 O.R. 361; *Watts v. Kelson* (1870), L.R. 6 Ch. 166. The plaintiff is estopped from making any claim for damages. An injunction will not lie. Compliance with it would be most oppressive and expensive, if not impossible of performance; and damages afford a complete remedy: *Kerr on Injunctions*, 3rd ed., 231; *Arthur v. Grand Trunk R. W. Co.* (1895), 22 O.R. 89; *Sayers v. Collyer* (1884), 28 Ch. D. 103; *Marker v. Marker* (1851), 9 Hare 1, 15. In the case of a corporation the Court will hold slight evidence of acquiescence sufficient: *Greenhalgh v. Manchester and Birmingham R. W. Co.* (1838), 3 My. & C. 784. If deemed a matter of non-repair of a highway it will not be enforced by injunction: *Attorney-General, ex rel. Beard v. Weston Plank Road Co.* (1853), 4 Gr. 211.

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R. McKay, for the respondent. There is no question but that the defendants by constructing the road as they did, and placing the culverts where they were have collected a large quantity of water, and thrown it on the plaintiff's land, and the effect is to practically confiscate it; a clear right of the plaintiff has been invaded, and he is, therefore, entitled to damages. It is not a question of *vis major*, and the referee has so found. The onus was on the defendants to shew that damage would have been occasioned to the plaintiff whether the culverts had been built or not. No agreement or acquiescence by the plaintiff's predecessor in title is shewn. The only thing that was done by him was that he dug the ditch on his land, but that was for his own protection, to enable the water brought on his land to run off. There is no agreement in writing, nothing of a binding character; no actual notice is brought home to the plaintiff when he purchased, and there is nothing on registry from which notice could be presumed; *Rose v. Peterkin* (1884), 13 S.C.R. 677; *Tolton v. Canadian Pacific R. W. Co.* (1891), 22 O.R. 204; *Harrington v. Spring Creek Cheese Manufacturing Co.* (1904), 7 O.L.R. 319. There is nothing on which acquiescence could be based. The moment the plaintiff had notice of the effect of the culverts he at once complained to the defendants, and has continued to protest ever since against the damage done to his land. There is nothing to shew that the injunction would be oppressive, but even if it were, this constitutes no answer. They cannot take away the plaintiff's land, and then set up that the Court is powerless to protect him: *Imperial Gas, Light and Coke Co. v. Broadbent* (1859), 7 H.L. Cas. 600, 618. Damages will not be a sufficient remedy. The Court will not allow the wrong to continue until the defendants have acquired an easement by prescription: *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 310.

June 29. The judgment of the Court was delivered by Moss, C.J.O.:—The plaintiff's farm is the north half of lot 14 in the first concession of Grey. The Mountain road is carried down the side of the Blue Mountain range, approaching the plaintiff's farm from the west until it has nearly reached the original road allowance between the first and second concessions, where it

turns to the north and enters the original road allowance. At or near this point there is a wooden culvert crossing the roadway from the west to the east through which are discharged waters collected in the ditch on the north side of the highway; and it was owing, in very large if not sole measure, to this culvert that the damages for which the plaintiff has judgment were allowed.

But the defendants contend that, notwithstanding that it has been found that the culvert in question—spoken of in the evidence as culvert No. 1—causes damage, and that the award is now acquiesced in, there should be no injunction in respect of it.

It is said first that it was constructed with the consent and acquiescence of one Kirby, a former owner of the farm through whom the plaintiff derives title, and that the plaintiff acquired his title with notice and knowledge of the existence of the culvert and the way in which it had been used, and was therefore precluded from objecting to it. What appears is that when it was proposed to construct the culvert with a view to carrying off some of the water which came down from the area above the highway Kirby was willing that the waters coming through the culvert should be carried off through a corner of his field adjoining the turn of the highway to a large ravine or gully on his farm, and himself dug or made the drain through his lands for that purpose. But there is nothing to shew more than a revocable license to carry the waters to the ravine in that way. It cannot be said that there was such an expenditure, if indeed there was any, on the faith of an agreement to permit the use of the land as to make a case of irrevocable license. There was nothing in writing and no consideration, and nothing to prevent Kirby or his successors in title from revoking the license at any time.

But, assuming an agreement binding Kirby, the defendants have not succeeded in establishing such notice and knowledge of that agreement to the plaintiff as purchaser with a registered title as to prevent him from objecting.

It is not sufficient to shew that he was aware of the existence of the culvert and the drain through his land. It is necessary to go further and shew that he knew that the drain

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was there under agreement: *Ross v. Hunter* (1882), 7 S.C.R. 289; *Harrington v. Spring Creek Cheese Manufacturing Co.* (1904), 7 O.L.R. 319, at p. 325.

The defendants also contend that the comparatively small amount of the damages is a reason for withholding the injunction. But the damages are fairly substantial; the cause is a continuing one, it is not unlikely to recur, and there is a prospect of the use, if allowed to continue, growing into an easement by prescription. Against these consequences the plaintiff is entitled to an injunction for the protection of his rights.

The next culvert affected by the injunction is that spoken of in the evidence as culvert No. 2. It is a 12-inch tile culvert on the south or upper side of the turn of the Mountain road and conveys water from the ditch on the south side of the highway in a south-easterly direction into the ravine. It is found, and the evidence shews, that the water conveyed into the ravine by means of this culvert caused no damage to the plaintiff. It is extremely doubtful whether any part of the culvert is situate on the plaintiff's land.

The plan prepared by Mr. Gaviller, P.L.S., for the plaintiff, and put in by him at the trial, shews the culvert to be wholly situate on the land of James Lunan, the proprietor of lot 14 of the second concession of Collingwood. From the plan prepared by Mr. McDowall, C.E., for the defendants, it would seem that its terminus is on the original road allowance just west of the line of the plaintiff's farm; and the evidence does not clearly shew that any part of it actually encroaches on the plaintiff's land. The objection to it is that it leads water into the ravine thereby causing it to flow in the stream there. But, as has been found, the water coming through it causes no damage to the plaintiff. If this had been the sole ground of the plaintiff's action he must have failed upon the evidence and the findings; and there could have been no injunction interfering with the operation of this culvert. But the injunction granted does interfere with and will prevent the defendants from using it for the purposes for which it was placed there. As appears it was placed where it is as part of a scheme for relieving the highway from the flow of waters from the mountain side; carried out pursuant to the directions of Mr. McDowall the township engineer.

It was sought to bind the plaintiff to this scheme as a work done under and in pursuance of the Ditches and Watercourses Act, and of an agreement by the plaintiff. But it is plain from the circumstances, as well as from the testimony of Mr. McDowall, that, in recommending or directing the work in question, he was not acting under the agreement with the plaintiff, or making an award under the Ditches and Watercourses Act. However, the placing of the various pipe culverts at different points of the highway, and their operation in the manner directed by Mr. McDowall, tend not only to relieve the highway of the descending waters, but also to reduce very considerably the flow of water towards and into the wooden culvert No. 1.

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It is said that at the time of the overflow in 1902 there was not an opening in the ditch at the mouth of culvert No. 3, or a dam to prevent the waters coming through it from flowing east to culvert No. 1. But this was denied, and it seems that at the time of the trial the opening and dam were there.

However that may be the injunction granted appears to be more extensive, and to impose greater obligations upon the defendants than the plaintiff is entitled to demand. All that he is entitled to upon the case, as developed, is the prevention of injury to the field known as the road field from the action of the water brought to culvert No. 1, the course of which is shewn in the plans. And the wide general terms of the injunction granted should be modified accordingly.

Probably an injunction restraining the defendants from maintaining or using the ditch on the north side of the highway and the culvert No. 1 in such manner as to thereby discharge or cause to be discharged waters from the said highway upon or over that part of the plaintiff's farm, designated "the road field," will be sufficient to give the plaintiff all he is entitled to. But the form of the order may, if necessary, be spoken to in Chambers. If the defendants require it the operation of the injunction may be suspended for a reasonable time to enable them to take such steps as may be necessary in consequence of the injunction.

The defendants will pay the plaintiff two-thirds of the costs of the appeal.

G. F. H.

[STREET, J.]

1905

PLENDERLEITH V. SMITH.

May 12.

Parties — Mortgagees — Joint Interest — Trustees — Foreclosure — Devolution of Estates Act — 60 Vict. ch. 14, sec. 29 (O.), 54 Vict. ch. 18, sec. 1 (O.) — R.S.O. 1897, ch. 121, sec. 13.

By sec. 29 of 60 Vict. ch. 14 (O.), sec. 1, of 54 Vict. ch. 18 (O.), is interpreted as applying only to the estates of persons dying on or after May 4th, 1891, and this interpretation is made retrospective, save as to conveyances theretofore made.

A husband, who with his wife had jointly mortgaged certain lands, died in 1890, having appointed his wife his executrix and devised to her all his estate. The wife died in the same year, having appointed two executors, and devised all her estate to the plaintiff. Default having been made in the payment of the mortgage which had been assigned to two persons as trustees, although no trust appeared on the face of the assignment, who had taken a renewal with a covenant to pay subsequent to the passing of sec. 13 R.S.O. 1897, ch. 121, the surviving assignee brought an action against the wife's executors and obtained judgment of foreclosure and entered into possession. He subsequently sold the lands to one of the defendants, who also entered into possession and mortgaged to the other defendant. In a redemption action brought by the daughter of the mortgagors against the defendants:—

Held, that the husband and wife having died before the 4th of May, 1891, the equity of redemption at the time of the foreclosure action and judgment was vested in the wife's executors, so that the judgment recovered against them was effective, the daughter not being a necessary or proper party.

Held also, that the personal representatives of the deceased assignee were not necessary parties for under sec. 13 of the R.S.O. 1897, ch. 11, the mortgage was vested in the two assignees jointly, so that the survivor was entitled to receive the money and enforce payment, although, but for that statute, had the defendants objected, the personal representatives would have been necessary parties.

THIS was an action tried before STREET, J., upon the pleadings and the written statement of Mr. Justice MacLennan, at the non-jury sittings at Toronto, in May, 1905.

T. Hislop, for the plaintiff.

J. B. O'Brian, for the defendants.

The facts, so far as material, were as follows:

On 13th October, 1882, Mary Ann Plenderleith and her husband John Plenderleith joined as mortgagors in mortgaging certain lands in the city of Toronto to one Byrch as security for a loan of \$2,600 and interest.

On 7th August, 1884, Byrch assigned the mortgage to James MacLennan and John Downey, who took it as trustees

for certain clients of theirs, with whose money it was purchased, but no trust appeared on the face of the assignment.

On the 1st October, 1887, an agreement under seal was entered into between the mortgagors and Messrs. MacLennan and Downey, the assignees of the mortgage, by which the time for payment of the mortgage money was extended to 1st October, 1892, and the rate of interest was reduced, and it was agreed that all the covenants, powers, provisions and conditions expressed in the said mortgage should apply to the extended term. And the mortgagors covenanted with the assignees to pay the principal money and interest at the new dates mentioned in the agreement as if those dates had been inserted in the original mortgage.

John Plenderleith died on 14th July, 1890, leaving a will whereby he devised all his real and personal estate to his wife Mary Ann Plenderleith, and appointed her to be his sole executrix. This will was proved by her on 23rd July, 1890.

Mary Ann Plenderleith died on 22nd September, 1890, also leaving a will whereby she appointed the defendants, James M. Brown and Jessie Brown, to be her executor and executrix, and whereby also she devised all her real and personal estate to her daughter Eliza Plenderleith, the plaintiff in the present action, then an infant. Probate of this will was granted to the executor and executrix named therein on the 2nd October, 1890.

John Downey, one of the assignees of the mortgage, died on 11th April, 1894, leaving a will and appointing executors.

On 28th November, 1894, the surviving assignee of the mortgage, Mr. Justice MacLennan, brought an action to foreclose the mortgage against James M. Brown and Jessie Brown, executors of the estates of Mary Ann Plenderleith and John Plenderleith. In the statement of claim it was alleged that the plaintiff and Downey held the mortgage as mortgagees in trust, and that the plaintiff after the death of Downey was entitled, as surviving mortgagee and trustee, to the moneys secured by the mortgage. The defendants filed an answer admitting their character of executor and executrix to the estates of John Plenderleith and Mary Ann Plenderleith: they set out the devise by the latter to her daughter

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Eliza Plenderleith, and submitted that she was a necessary party to the action. The usual foreclosure judgment was obtained upon motion for judgment, and admissions and documents filed, and after a reference and report a final order of foreclosure was made on Nov. 28th, 1895, against all the defendants.

On 1st May, 1902, James Maclellan conveyed the land in question to one George Hamilton. On 2nd May, 1902, George Hamilton conveyed the land in question to the defendant, George B. Smith, who, on the same day, conveyed it by way of mortgage to the defendant Augustus Thomas to secure a loan of \$1,700 and interest.

On 14th November, 1904, the present action for redemption was brought by Eliza Plenderleith against George B. Smith and Augustus Thomas alleging that the foreclosure proceedings were irregular in that the personal representatives of Downey were not made parties to it, and that Eliza Plenderleith was not made a party defendant.

Maclellan had entered into possession of the lot after the foreclosure as owner, and since then the possession had followed the conveyances.

The learned Judge reserved his decision and subsequently delivered the following judgment:—

May 12. STREET, J.:—It is contended by the plaintiff that the title to the equity of redemption at the time of the foreclosure proceedings was vested in her, and not in the executor and executrix of her mother's estate, who were treated in the foreclosure action as owners of the equity, and were the sole original defendants in the action.

If the law laid down in *Re Martin* (1895), 26 O.R. 465, were to govern this would be the case, for it was there held by the Chancellor that the joint effect of 54 Vict. ch. 18, sec. 1, and 56 Vict. ch. 20, sec. 4, was to vest all estates in the devisees under the wills of persons dying at any time, whether before or after 4th May, 1891, unless the executors registered a caution within a year.

That construction, however, was not approved by the Legislature, and the declaratory sec. 29 of 60 Vict. ch. 14, expressly

interprets the 1st sec. of ch. 18 of 54 Vict. as applying only to the estates of persons dying after 4th May, 1891, and this interpretation is made retrospective save where a conveyance had been made before the passing of the declaratory section.

Both Mr. and Mrs. Plenderleith died before 4th May, 1891, and the result is that I must hold that the equity of redemption was vested in their executor and executrix at the time of the foreclosure action and judgment: they were properly made defendants as owners of the equity, and the present plaintiff, Eliza Plenderleith, the devisee of her mother, was neither a necessary nor a proper party to the foreclosure action.

This seems to dispose of the objection to the foreclosure proceedings based upon the theory that Eliza Plenderleith was a necessary party to them, and that the foreclosure order was void as against her.

The other objection is that Downey's personal representatives were necessary parties to the foreclosure proceedings. In my opinion they were not necessary parties. In the first place I think the case is within sec. 13 of R.S.O. 1897, ch. 121, which entitles a surviving mortgagee in the case of a mortgage or obligation made or assigned to two persons "jointly and not in shares" to receive from the mortgagor and to give a valid discharge of the mortgage. This mortgage became the property of the two assignees in my opinion "jointly and not in shares" within the meaning of this section, and Mr. Justice Maclellan, the survivor, became entitled as against the mortgagors to receive the money and to enforce payment of it by action. It is true that this section applies only to securities made or assigned after 1st July, 1886, but the renewal agreement was made after that date and contains a direct covenant by the mortgagors with the assignees to pay the mortgage money and interest at a new day, and this constitutes a new "obligation" after 1st July, 1886, so as to bring the case within the section.

Even, however, if this section should be held not to govern it the plaintiff, in my opinion, must still fail. The statement of claim in the foreclosure action alleges that Mr. Justice Maclellan and Mr. Downey took and always held the mortgage,

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and the monies secured by it as trustees. They, being trustees, the right to recover the money survived both at law and in equity, upon the death of Downey, to his co-trustee Maclellan. It is true that if the defendants had objected that Downey's representatives should be made parties, they must have been added in order that the defendants might have them bound by the judgment. But the defendants made no such objection being no doubt satisfied of the truth of the statement that the plaintiff and Downey had held as trustees, and that therefore the action was properly maintainable by Maclellan alone. The truth of that statement has been proved before me, and it is impossible to give effect to an objection taken ten years after the judgment, based upon the unfounded statement that Downey had a beneficial interest in the mortgage money.

The action must therefore be dismissed with costs.

G. F. H.

[DIVISIONAL COURT.]

BECK V. ONTARIO LUMBER COMPANY.

D. C.

1905

June 1.

Water and Watercourses—Improvements on Stream—Floating Logs over—Reasonable Tolls—Order for—Restriction to Future Tolls—R.S.O. ch. 142, secs. 11, 13.

The reasonable tolls which, under secs. 11 and 13 of the Rivers and Streams Act, R.S.O. 1897, ch. 142, the person who has made improvements on a stream is entitled to recover on logs floated over them, are those chargeable on logs floated after but not before the making of the order of the county or district Judge, under section 13.

THIS was an appeal by the plaintiffs from the judgment of MacMahon, J., dismissing the action.

The plaintiffs sued to recover reasonable tolls under sec. 11 of the Rivers and Streams Act, R.S.O. 1897 ch. 142, for the use by the defendants of improvements made by the plaintiffs upon a stream called Post Creek, prior to the fixing of the amount of such tolls by the Judge of the district court of Nipissing under sec. 13 of the Act.

In 1903 the plaintiffs had applied to the district Judge and obtained from him an order fixing the tolls to be paid.

From this order there was an appeal by the defendants to the Divisional Court under sec. 15 of the Act, which on December 16th, 1903, was heard before Falconbridge, C.J.K.B., Street and Britton, JJ.

On March 10th, 1904, the judgment of the Court was delivered by Street, J., who, after considering the proceedings before the district court Judge and the evidence as to certain matters not material to this report proceeded as follows:—

STREET, J.:—Upon the construction of the Act, R.S.O. ch. 142, I cannot find any authority for the position that a person who has made improvements upon a stream can obtain from the district or county Judge an order fixing tolls to be paid upon logs which have been floated over them previous to the making of the order. A contrary interpretation would entitle the owner of the improvements to go back for six years and

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recover tolls fixed in 1900—upon logs floated down in 1894 for instance.

The reasonable tolls payable under sec. 11 are to be taken as being those fixed under sec. 13, and they are chargeable upon all logs going down after the tolls are fixed. The provisions of sec. 19, under which a lien for, and a summary method of collecting, tolls are given, shew that the tolls mentioned in the Act, in accordance with the nature of tolls in general, are definite sums ascertained in the manner provided by the Act before the logs become liable to them.

There is no hardship upon the owner of improvements in so holding, because the proceeding before the Judge is of a most summary character and may be made by him at any time.

It appears, therefore, to be necessary that the appeal should be allowed, and the order of the learned Judge should be set aside with costs, without prejudice, however, to a further application by either party to him to fix a proper rate of tolls to be taken for the future by the Beck Company upon the further evidence necessary.

The plaintiffs then applied to the district Judge, putting in, as alleged, the required further evidence, and obtained an order fixing the amount of the tolls to be paid.

The plaintiffs claimed that they were entitled under this order to be paid tolls for logs floated down prior to the making of the said order, and on the defendants' refusal to pay same, this action was brought.

The action came on for hearing before MacMahon, J., without a jury, on March 6th, 1905, when the learned Judge was of opinion that he was bound by the previous judgment of the Divisional Court in this action, and dismissed the action with costs.

From this judgment there was an appeal to the Divisional Court.

On May 23rd, 1905, the appeal was heard before MEREDITH, C.J.C.P., TEETZEL, and ANGLIN, JJ.

W. R. Riddell, K. C., and *F. E. Hodgins*, K. C., for the appellants.

A. G. F. Lawrence, for the defendants.

The arguments sufficiently appear in the judgments.

June 1. The judgment of the Court was delivered by ANGLIN, J.:—This was an appeal by the plaintiffs from the judgment of MacMahon, J., dismissing the action.

The plaintiffs sued to recover “reasonable tolls” under sec. 11 of the Rivers and Streams Act, R.S.O. 1897 ch. 142, for the use by the defendants of improvements made by the plaintiffs upon a stream called Post Creek, prior to the fixing of the amount of such tolls by the Judge of the district court of Nipissing under sec. 13 of the same Act.

The learned Judge was of the opinion that he was bound by the judgment of the Divisional Court in the action between the same parties, reported in 3 O.W.R. 333, and he dismissed the action with costs.

The plaintiffs had, early in the year 1904, made application to His Honour Judge Valin to fix rates of toll for the use of these improvements. Thereupon the learned Judge made an order which did not specify “whether it was to be applicable to logs floated down by the lumber company in the past as well as in the future, or in the future only.” Upon appeal a Divisional Court set this order aside upon the ground that the district court Judge had not before him the necessary evidence to make a proper finding, and had not taken into consideration certain matters which the statute declares to be material.

Mr. Justice Street, delivering judgment of the Divisional Court, said:—[here the learned Judge set out the foregoing judgment of Street, J.]

The order of the Divisional Court set aside the order of the district Judge “without prejudice to a further application by either party to the Judge to fix a proper rate of tolls to be taken for the future by the Beck Company, upon the further evidence necessary.”

It is conceded that the right to demand tolls depends entirely upon sec. 11 of R.S.O. ch. 142, and it is the tolls authorized by that section which plaintiffs claim to recover. If these tolls are those to be fixed under sec. 13, and if such tolls are only chargeable upon logs going down after an order under the latter section has been made, the plaintiffs’ case

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necessarily fails. Upon both these grounds the opinion of the Divisional Court, reported in the O.W.R., vol. 3, is explicit and adverse to the plaintiffs. The provision of the order made by the Court restricting the further application to the district Judge to future tolls is based upon that opinion. The decision of that Court, proceeding under secs. 15 and 16 of the statute, was final. It was not contended that the Divisional Court exceeded its jurisdiction in pronouncing an order limiting any further action of the district Judge to the fixing of future tolls.

It follows that the opinion expressed upon the construction of R.S.O. ch. 142 was not *obiter dictum*, but was, within the meaning of sec. 81, sub-sec. 2, of the Judicature Act, R.S.O. ch. 51, a decision of a Court of co-ordinate authority which we may not disregard or depart from.

The appeal fails and must be dismissed with costs.

G. F. H.

[STREET, J.]

RE GOULET.

1905

June 24.

*Will — Construction — Devise of Lands Subject to Mortgages — Exoneration—
R.S.O. 1897, ch. 128, sec. 37.*

A testator by the 3rd clause of his will devised to his son X., after his mother's death, a certain lot in which the testator had given her a life estate; and also two other parcels. By the 4th clause he devised to his son A. a certain lot of land on condition of his paying \$1,000 to assist in paying off the mortgage on the property; but if he failed to do so, he devised the lot to his son X. By the 5th clause he devised to A. the last specified lot devised to X., X. to pay A. \$500 and to have his lands charged therewith. A. refused to accept the lot firstly devised to him, taking the lands secondly devised to him. This parcel was subject to a mortgage for \$750, while all the other lands were subject to a mortgage for \$4,000:—

Held, that X. on taking the lands firstly devised to A. was not bound to pay the \$1,000 in reduction of the mortgage, the \$500 he was to pay A. being substituted for that liability.

By clauses 6, 7, 8 the testator devised to his three daughters three named parcels of land; and by a codicil he directed that if the mortgage on the lands was not paid, each of his daughters should pay \$150 to assist in meeting that debt, charging the lands therewith:—

Held, that the daughters on paying the \$150 were not entitled to hold their lands exonerated from the mortgage for \$4,000 on the lands devised to them, for under sec. 37 of the Wills Act, R.S.O. 1897, ch. 128, the devise was merely of an equity of redemption and the lands were still liable to the payment of same.

By another clause of the will the testator directed that his wife was to have free control of his lands for ten years after his death in order to pay off the mortgage, if not paid at his death. The wife predeceased the testator:—

Held, that the trust thereby created terminated on the death of the wife.

THIS was a motion for the construction of the will of Alexander Goulet, deceased, dated May 7th, 1899, under Rule 938, heard before STREET, J., in Court, on 21st of June, 1905, in whose judgment the will and codicil are set out.

Aylesworth, K.C., for the executors.

W. E. Middleton, for the three daughters.

The arguments sufficiently appear in the judgment.

June 24. STREET, J.:—Alexander Goulet, the testator, died in February, 1902, leaving a will and codicil thereto as follows:

1st. "I hereby constitute and appoint my two sons, Francis Xavier and Alexander Blake, to be the executors of this my will, and direct my executors to pay my just debts and funeral expenses:

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2nd. (a). I devise and bequeath to my wife Mary, the easterly half of lot number one hundred and fifty-four, Talbot road, in the township of Raleigh, in the county of Kent, Ontario, with everything that appertaineth thereto, during her natural life.

(b). I give to my wife Mary, all household goods and chattel property of all kinds, that may belong to me at the time of my death.

3rd. I devise and bequeath to my son, Francis Xavier, the easterly half of lot number one hundred and fifty-four, Talbot road, in the township of Raleigh, county of Kent, after his mother's death; the easterly half of the northerly half of lot seven, in the fourteenth concession of the township of Raleigh, and the south ninety-five acres of lot eight, in the fourteenth concession of the township of Raleigh.

4th. I devise and bequeath to my son Alexander Blake, the westerly half of lot number one hundred and fifty-three, Talbot road, in the township of Raleigh, county of Kent, on condition that he pays one thousand dollars, to assist in paying off the mortgage. If he fails to pay the above said amount then I devise and bequeath the said westerly half of lot one hundred and fifty-three to my son Francis Xavier.

5th. In place of land, mentioned in the 4th clause of my will, I devise and bequeath to my son, Alexander Blake, the south ninety-five acres of lot eight in the fourteenth concession of the township of Raleigh, mentioned in the third clause of will; and further, will him five hundred dollars, and hold the lands willed to my son, Francis Xavier, for the said amount.

6th. I devise and bequeath to my daughter, Rachael Jane, the westerly half of the south eighty acres of lot number seven, in the fourteenth concession of the township of Raleigh, in the county of Kent.

7th. I devise and bequeath to my daughter, Margaret Christenna, the easterly half of the south eighty acres of lot seven, in the fourteenth concession of the township of Raleigh, in the county of Kent.

8th. I devise and bequeath to my daughter, Delia Eugenia, the westerly half of the northerly half of lot seven in the four-

teenth concession of the township of Raleigh, in the county of Kent.

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9th. I further will that my wife, Mary, shall have full use and control over all my lands for ten years after my death, in order to pay off the mortgage now standing against my real estate, if not paid at the time of decease.

A codicil to his will, dated June 5th, 1899, was as follows :

1st. I will that if, at the time of my decease, the mortgages on my real estate are not paid off, each of my daughters shall pay to the executors of my last will and testament, the sum of one hundred and fifty dollars, to assist in meeting that debt, and I charge the lands willed to each for the respective amounts.

2nd. I will to my wife, Mary, all money to be derived from a policy in the Edinburgh Life Insurance Company.

In all other respects I do hereby confirm my last will and testament.

The testator's wife predeceased him. At the time of his death the land, mentioned in the 3rd paragraph of the will, was subject to a mortgage for \$750, and all the other parcels mentioned in the will were subject to a mortgage for about \$4,000.

Alexander Blake Goulet declined to take the lot in the 4th paragraph mentioned, and elected to take the lot in the 5th paragraph mentioned, with the charge upon the lands of Francis Xavier of \$500.

The questions are—

1. Whether Francis Xavier taking the lands mentioned in the 4th paragraph, by reason of the default of Alexander Blake, is bound to pay in reduction of the mortgage the \$1,000 which the latter must have paid had he taken the lands ?

In my opinion he is not bound to pay this, because the will does not require him to do so in the event which has happened, but substitutes a payment by him of \$500, to be made to Alexander Blake.

2. Whether a trustee should be appointed to perform the duty imposed upon the testator's wife, Mary, by the 9th clause had she lived ?

I am of opinion that any trust created by that clause terminated at the death of Mary Goulet.

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3. Whether the three daughters named in paragraphs 6, 7 and 8 of the will, are entitled to have their lands exonerated from the \$4,000 mortgage, upon payment of the \$150 charged by the codicil upon the land devised to each?

I regret that I am unable to find in the language used by the testator an intention to exonerate the daughters' lands from all but \$150 of the mortgage debt.

The question is governed by the 37th section of the Wills Act, R.S.O. 1897 ch. 128. Under that Act every devise of land which is under mortgage is treated as a devise of the equity of redemption only, and the devisee takes, subject to the obligation of paying off the mortgage, or a proportion of it, if it covers lands devised to others, unless the testator has, by his will, or some other document, signified a contrary intention.

The three daughters by the will took, therefore, an equity of redemption in the land devised to them, subject to the payment of a proportion of the \$4,000 mortgage. The codicil directs them to pay \$150 each to the executors to assist in paying the mortgage, and creates a new charge upon their land for that amount. The testator has not anywhere signified an intention that the payment of this \$150 should relieve them from the liability which existed under the devise in the will of paying their shares of the \$4,000 mortgage debt.

It is not at all impossible that his intention may have been that they should pay no more towards the mortgage than the \$150, but I can not find that he has expressed such an intention. I am, therefore, of opinion that they must each pay the \$150 in addition to their shares of the \$4,000 mortgage.

The \$150 so to be paid by them is by the terms of the codicil to be applied in reduction of both mortgages, that for \$750, as well as that for \$4,000.

Costs out of the estate; those of the executors, as between solicitor and client.

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[IN THE COURT OF APPEAL.]

BRADLEY V. THE CORPORATION OF THE TOWNSHIP OF RALEIGH.

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June 29.

Water and Watercourses—Drainage of Lands—Pumping Machinery—Negligent Operation of—Lands Injuriouslly Affected by—Damages—Drainage Act, R.S.O. 1897, ch. 226, sec. 73, 1 Edw. VII., ch. 30, sec. 4.

Persons whose lands are injuriously affected by the non-operation, or imperfect or negligent operation of pumping machinery constructed under the Drainage Act, R.S.O. 1897, ch. 226, are entitled to damages under the provisions of sec. 73 of that Act, and sec. 4 of 1 Edw. VII., ch. 30 (O.).

Where therefore the plaintiff's lands and crops were injured by the overflow of water caused by the neglect of the corporation to efficiently operate the pumping plant erected in connection with certain drainage works constructed by the township, the plaintiff was held entitled to recover damages for the injury he had sustained, one half of which was imposed on the general funds of the township, and the other half on the area benefited.

THIS was an appeal by the defendants, and a cross appeal by the plaintiff, from the judgment of a drainage referee.

The facts are stated in the judgment of the Court.

On April 28, 1905, the appeal was heard before MOSS, C.J.O., OSLER, MACLENNAN and MACLAREN, JJ.A.

Matthew Wilson, K.C., for the appellants. No negligence is shewn on the part of the defendants. The plaintiff contends that the damage was caused through want of repair, and defective operation. The trouble was caused here through the insufficiency of the pumping scheme to drain the lands. The engineer recommended a more extensive system with double the pumping capacity, but the plaintiff and the other land owners interested were not willing to incur the additional expense. Section 73 of the Drainage Act, R.S.O. 1897, ch. 226, deals with the question of repairs, and such repairs must be borne by the persons assessed for the work, and not by the ratepayers generally: *Corporation of the Township of Sombra v. Corporation of the Township of Chatham* (1891), 18 A.R. 252. There were no defects here which affected the pumping capacity of the pump. The only effect was to entail additional labour and expense, and it is not questioned that after the pump commenced working it worked effectively. There was no neglect in operation. So soon as the defendants were made aware

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on the Sunday morning that the water was rising the engineer commenced working, although not obliged to work on Sunday, and the pump was kept working continuously until the water was drained off. The plaintiff cannot complain that the pumping was not commenced on the Saturday night. The plaintiff knew that the engineer did not live on the premises, there being no accommodation for him, and though the plaintiff lived on the land close by, and was in the habit of warning the engineer she did not do so on this occasion. There was no obligation to commence pumping before the water rose over four feet below the level of the land; but even if they had been working the water could not have been kept down in consequence of the excessive rainfall, and the defendants are not responsible for this. There is no liability in damages under sec. 3 (2) and sec. 81 of the Act. The defendants are also relieved from liability by reason of the appointment of the commissioners. The pumping plant having been put in at the plaintiff's express request, she is estopped from making any claim in respect thereof.

O. L. Lewis, for the respondent. The plaintiff did not petition for the pumping plant, nor was it installed at her instigation. It was installed as part of a scheme for the drainage of the lands in the locality, and it was approved of by the engineer and adopted by the corporation. It was amply sufficient to drain the lands, had it been properly maintained and operated. There was negligent operation of the pumping plant. The by-law requires, and the referee expressly found, that the water in the reservoir was to be kept down to at least 4 feet below the surface of the ground, and had this provision been complied with the water never could have risen and damaged the plaintiff's lands. The pump was quite capable of lowering the water to at least 6 feet below the surface, and had the pump been properly attended to this could have been done. It is no answer to say that the engineer did not attend at night because there was no sleeping accommodation for him. It was the duty of the defendants to have provided the necessary accommodation. Complaints were frequently made by the plaintiff as to the negligent operation of the pump. The evidence also shews that the engine and the boiler were not

in proper repair, and that they affected the proper working of the pump. Repairs of this character must be borne by the ratepayers generally. There is under the circumstances no estoppel on the plaintiff. On the cross appeal the plaintiff asked to have the damages increased.

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June 29. The judgment of the Court was delivered by MACLENNAN, J.A.:—The plaintiff's claim is for injury to her land and crops by the overflow of water in the years 1901 and 1902, caused by the neglect of the township to operate efficiently the pumping plant erected in connection with certain drainage works constructed by the defendants within the township.

The referee disallowed the plaintiff's claim for the damage of 1901, but awarded a sum of \$200 for the damage of 1902, to be apportioned equally upon the area and the general funds of the township.

The by-law under which the pumping plant and the relative drainage works were erected and constructed was passed on the 14th March, 1898. But in former years there had been constructed in the same region and neighbourhood several other drainage works, connected with a pumping outlet which were then in operation, and with which the later work when completed was connected, and the water carried by which was to be removed by a new pumping system substituted for the former. The works were constructed, the estimated cost being \$6,852, of which \$2,800 was for new pump works, and \$516 the annual cost of operating the pump.

On the 15th December, 1898, a by-law was passed appointing one Frank Crackle engineer for the pump works, and defining his duties and remuneration. He was to keep the engine and boiler thoroughly clean and free from rust, and always in good running order. He was to set in motion the engine and pump at any time whatsoever, and as often as the water in the reservoir in drain in front of the pump rose four feet below the level of the land on either side of the drain, and keep the pump in motion day by day and every day—a day to consist of twelve hours—Sundays excepted, until the water in the drain was lowered to at least four feet below the level of the adjoining land, and he was to report any need of repair immediately to

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the commissioner of works. His wages were to be \$1.25 for each necessary day's work.

The commissioner of works had been appointed in 1894, in pursuance of sec. 81 of the Drainage Act, and was one Charles Crow, with whom, by by-law passed on the 23rd of April, 1900, were associated George Brunette and Nathaniel Massey; and their duty was to superintend the pumping works. Adjacent to the pumping station was an extensive and deep dredge-cut reservoir, which received the waters conducted thereto by the various drains, and from which the water was drawn by the pump and discharged over an embankment.

The pump was centrifugal and the estimate of the engineer was that it should be capable of discharging 1,600 Imperial gallons per minute with a lift of six feet.

There is no evidence, and it was not contended, that the drainage and the pumping apparatus were not constructed and completed in accordance with the engineer's report and the township by-law. It is, however, shewn that it was the opinion of the engineer when advising the work that, in order to perfect efficiency, two engines instead of one should be provided for the pumping operations. This, however, was objected to by the parties who were to be benefited by and chargeable with the expense of the works, and the less expensive work was recommended by the engineer, and was adopted.

It is not claimed either that the injury complained of has been caused by the construction of the works; and the question is whether it was occasioned by the original insufficiency of the pumping apparatus or by negligence in its operation. If by the former the plaintiff cannot succeed in her action, but must bear her loss without remedy; but if it has arisen from the negligence of the defendants, either in not keeping the pumping apparatus in repair or in not operating it properly and sufficiently, then I think she is entitled to recover.

By sec. 3 (2) of the Drainage Act it is enacted that the provisions of the Act shall extend and apply to every case where the drainage work can only be effectually executed by embanking, pumping, or other mechanical operations; and therefore this drainage work includes the pumping apparatus and its operation. It follows also that the duty of maintenance imposed by sec. 68

includes not only the excavations, embankments, and pumping machinery, but also the operation of that machinery, and I think it also follows that persons whose property is injuriously affected by the non-operation, or imperfect or negligent operation, of the pumping machinery, are entitled to damages under the provisions of sec. 73 of the Revised Statute, and the new sec. 73 enacted by 1 Edw. VII., ch. 30, sec. 4 (O.).

This view is confirmed by sec. 81, which authorises, for the better *maintenance* of the drainage work, the appointment of one or more commissioners, with power to do all things necessary for successfully operating the work; and provides for levying the cost of doing so upon the area.

Neither the by-law appointing Charles Crow in the first instance, in 1894, as commissioner for the old pumping works, nor that of 1900 appointing Brunette and Massey as associate commissioners with him for the new works, gives any express powers or directions to the commissioners as provided by sec. 81, but, as we have seen, an engineer was appointed directly by the council on the 15th December, 1898, with express and detailed directions for operating the pumping engine.

It was argued that the appointment of these officers exonerated the township from liability for their neglect or omissions; but I see no ground on which that contention can be maintained. Frank Crackle was the first engineer. His duty was to set the pump in motion whenever the water in the reservoir by the pump rose above four feet below the level of the land on either side of the drain. Instead of doing that his practice was to begin when the water was only one foot below the level, and he says that he did not go to the pump house after the 1st of October, 1901. He had a water mark near his own house where he lived, about a mile from the pump, by which he could tell when the water rose within a foot of the level of the land at the pump.

The evidence is that the level of the land at the pump house is the lowest in the whole drainage area, and it is evident that if the water at the pump was kept four feet below the level of the land the whole area would be safe; and that is the degree of safety which the council endeavoured to secure by their instructions to the engineer.

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There is evidence of much rain having fallen in October, November, and December, 1901, that the plaintiff's corn field, consisting of six acres adjacent to the pumping station, became very wet, and that his corn, which he left in the field, as he had a right to do, and which would have been safe if the water had been taken off, was injured.

I think it is a fair conclusion that, if Crackle had operated the pump according to his instructions, the plaintiff's land would have been kept reasonably free from water, and the injury to that crop would not have occurred.

The referee has assessed the plaintiff's damage at \$75 for this injury in 1901, but has disallowed it on the ground that it was not good husbandry to leave the crop in the field during the winter. The evidence is that in dry land corn may be so left out during the winter without injury.

I therefore think this damage of \$75 should not have been disallowed.

Apparently there was no pumping done between 1st October and the 17th March, 1902, when Walter Crackley took charge. Nothing unusual seems to have occurred until the 28th of June, when a heavy rain began and continued for two or three days. The 28th was a Saturday. No pumping was begun until the following day, and both Crackley and Brunette (one of the commissioners) who were present, say that when the pumping began the water was up to the level of the land. The reservoir was full. The pumping was continued day and night by Crackley, with the assistance of several other persons, until the following Saturday. Crackley says he did not get control of the water until Tuesday, and McClatchey, who ran the engine in July and following months, says that when he began on Saturday the 5th of July, the water was one foot below the level of the land. During the Sunday Crackley says the water did not gain much, but afterwards did so, and spread over the plaintiff's field, and on Tuesday night he began to gain upon it. The overflow was for about a day and a half.

The learned referee has found that, had the pump been started at the proper time and continuously run, the water would not have reached the surface of the ground, and no damage would have been sustained by the plaintiff. I think

that conclusion is warranted by the evidence, notwithstanding the evidence of Mr. McGeorge, that, having regard to the rainfall reported by Mr. Pardo as having occurred at a station about twelve miles distant, and, assuming a similar quantity to have fallen in the area, the pump could not have prevented some overflow. I think the evidence of the actual operation of the pump and its actual results preferable to a mere theoretical statement upon an assumed hypothesis.

There was also some evidence of want of repair to the engine and boiler, but that alone would probably not have caused any damage if they had been operated as they might and ought to have been.

The referee here found the damage suffered by the plaintiff in 1902 to be the sum of \$200, and I do not think we are warranted in increasing that finding, and that for the reasons given by the referee, that some injury was caused by the wetness of the season apart from the defective operation of the drainage works.

I also agree with the referee in imposing on the general funds of the township one half of the damages and costs awarded to the plaintiff, and the other half upon the area benefited, although, as regards the costs, there seems an inconsistency between sec. 73 (c) and sec. 95 (2). I would have thought it more just in a case like the present to impose the whole upon the general funds, in which case the area would still have to contribute a share.

The area is not represented before us, except by the plaintiff, and she does not complain of this part of the judgment.

The appeal should be dismissed and the cross appeal allowed to the extent indicated, and both with costs.

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[IN CHAMBERS.]

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June 30.

IN THE MATTER OF THE ESTATE OF GEORGE ROACH.

Revenue—Succession Duty—Appraisement of Property by Sheriff—Appeal to Surrogate Judge—Amount Exceeding \$10,000—Further Appeal to High Court—Gift—Contemplation of Death—Deed Executed more than Year—Change of Possession—Valuation of Shares—R.S.O. 1897, ch. 24.

From the appraisement and assessment of a testator's estate by the sheriff, the Provincial Treasurer appealed under sec. 7 of the Succession Duty Act, R.S.O. 1897, ch. 24, to the Surrogate Judge, the notice of appeal stating that he appealed on the following amongst other grounds, the grounds stated being as to the sheriff not including in the appraisement the value of the homestead property, and the household goods valued at \$7,680 and \$1,000 respectively. The testator had more than a year before his death, and while in comparatively good health, conveyed the homestead to his two daughters in fee, the conveyance being at once registered. No change of possession however took place, the testator continuing to live in the house until his death. The Surrogate Judge, on the appeal, fixed the value of the estate at \$197,152.27, refusing to include the homestead property, but including the value of the household goods:—

Held, that the Provincial Treasurer came within the meaning of "any person," etc., contained in sec. 9 of the Act so as to have the right of appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; and the appeal being for an amount in excess of \$10,000, there was a further appeal to a judge in Court.

Held, also, that the conveyance to the daughters of the homestead property could not be deemed to have been made in contemplation of death within sec. 4, sub-sec. (b); but that it came within sub-sec. (c) of that section, which read in connection with the interpretation section, sec. 2, whereby "property" includes real as well as personal estate, and was subject to duty.

THIS was an appeal to STREET, J., in Chambers by the Treasurer of the Province of Ontario from a judgment or decision of the surrogate Judge of the county of Wentworth under the 9th section of the Succession Duties Act: and a cross appeal by the executors of the estate.

The learned surrogate Judge had assessed the value of the estate at \$197,152.27 upon an appeal from the appraisement and assessment by the sheriff under sec. 7 of the Act. In the amount arrived at by the Judge he refused to include the value of the homestead property of the deceased: he refused to alter the valuation of \$10,550 arrived at by the sheriff of certain stock in the Hamilton Park and Suburban Co.; but he included

\$1,000 in respect of the household goods of the deceased which the sheriff had not included.

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In the present appeal the Treasurer of Ontario sought to have the value of the homestead stated at \$7,680 added to the amount fixed by the county Judge, and to have the valuation of the stock in the Hamilton Park and Suburban Co. increased from \$10,550 to \$16,000. By the cross appeal of the executors they sought to reduce the valuation of the stock reduced from \$10,550 to \$4,000.

On June 23rd, 1905, the appeal and cross appeal were argued together.

A. Bruce, K.C., took the preliminary objection that the appeal did not lie; that the Treasurer had no status empowering him to appeal, as he did not come within the requirements of sec. 9 of the Act; that the appeal to the surrogate Judge was only as to the value of the homestead and property, the household property being included in the appraisal and assessment, and as these only amounted to \$8,680, and therefore being under \$10,000, the decision of the Judge was final under the section.

C. A. Masten and Chisholm, contra. The Treasurer has the right to appeal. He comes within the designation of "person" under the meaning of sec. 9. The appeal was not limited to the grounds specifically mentioned, but the whole subject matter of the appraisal was before the Judge. The appeal was not therefore limited to \$10,000, but the whole value of over \$100,000 was being considered.

The learned Judge allowed the appeal to proceed subject to the objection.

Masten and Chisholm then proceeded with their argument.

The first question is whether the value of the homestead property should be included in the valuation. This depends on the construction to be placed on sub-secs. (b) and (c) of sec. 4.*

*(b) All property situate as aforesaid or any interest therein or income therefrom, which shall be voluntarily transferred by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, bargainor, vendor or donor, or made or intended to take effect, in possession or enjoyment after

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To understand these sub-sections the different sources from which they were derived must be considered. Sub-section (b) is taken from an American Act, while sub-sec. (c) is taken from an English Act. Sub-section (b) is very wide in its terms, and according to the American decisions would include a *donatio mortis causa* referred to in sub-sec. (c). The proper conclusion to be derived from the evidence is that the testator conveyed the property to his daughters in contemplation of death. These words must be taken in their natural sense. This clearly brings it within sub-sec. (b). Sub-sec. (c) deals with the case of a *donatio mortis causa*, and, as before pointed out, this is included in sub-sec. (b). To create a valid gift of this kind possession must accompany it. Here there never was any change of possession. The testator continued to live in the house as he had always had done, and he assumed to deal with it by giving his wife a life estate in it. No doubt a *donatio mortis causa* in its ordinary sense refers merely to a gift of chattels, but under the interpretation section—sec. 2 of the Act—property under the Act includes real as well as personal property. This property therefore should be included in the appraisement. Then as to the shares in the Hamilton Park and Suburban Co.—this, of course, is purely a matter of valuation, and on the evidence the valuation should be at least \$20,000.

A. Bruce, K.C., and W. E. Middleton, for the executors. The gift of the homestead is valid. At the time the conveyance was made the testator was in a perfect state of health, and had no apprehension of death, and therefore in no sense can the gift be said to have been in contemplation of death.

such death, to any person in trust or otherwise, or by reason whereof any person shall become beneficially entitled in possession or expectancy to any property, or the income thereof.

(c) Any property taken as a *donatio mortis causa* made by any person dying on or after the 7th day of April, 1896, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bond fide* made twelve months before the death of the deceased including property taken under any gift, whenever made, of which property *bond fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise.

There was no intent to evade the payment of the duty: *Hanson on Death Duties*, 4th ed., 376-7; *Simms v. Registrar of Probates*, [1900] A.C. 323; *Payne v. Rex*, [1902] A.C. 552; *Crossman v. The Queen* (1886), 18 Q.B.D. 256, 262; *Earl Grey v. Attorney-General*, [1900] A.C. 125; *Attorney-General v. Worrall*, [1895] 1 Q.B. 99; *Cain v. Moon*, [1896] 2 Q.B. 283; *Attorney-General v. Holden*, [1903] 1 K.B. 835-7. The fact of the testator living on the premises after the gift to them does not take away from its effect. There must have been exclusive possession by the testator, so as to shew that the possession absolutely continued in him: *Kilpin v. Ratley*, [1892] 1 Q.B. 582. Sub-section (c) does not apply—a gift *donatio mortis causa* only applies to chattel property: *Hanson on Death Duties*, 4th ed., 107. The effect contended for cannot be given to the interpretation section. It cannot be held that the intention was to alter the whole scope and effect of a *donatio mortis causa*. The shares in the Park company were estimated at their proper value by the sheriff and surrogate Judge, and the Court will not therefore interfere with their valuation of them. Then as to the cross appeal. The value of the household goods should not have been included—they were given absolutely to his two daughters.

Masten, in reply. The household goods are covered by the same argument as applies to the homestead property. The argument is stronger as to them, as they are clearly the subject of a gift *mortis causa*, and it is quite clear that the possession of them never changed, while the testator by his will assumed to deal with them as his own by giving them to his wife for life.

June 30. STREET, J.:—A preliminary objection to the hearing of the appeal was taken upon the ground that the appeal of the Treasurer to the surrogate Judge related to property which did not exceed \$10,000 in value, and that therefore the decision of the surrogate Judge was final.

The notice of appeal to the surrogate Judge given by the Treasurer states that he "appeals to the surrogate Judge of the county of Wentworth from the appraisal and report of

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the sheriff . . . upon the following amongst other grounds." The grounds given relate only to the homestead (valued at \$7,680) and to the household effects (valued at \$1,000) so that if the appeal must be confined to these two matters the necessary limit is not reached.

Section 9 of the Act provides "that any person dissatisfied with the appraisement or assessment may appeal therefrom to the surrogate Judge . . . and upon such appeal the said Judge shall have jurisdiction to determine all questions of valuation and of the liability of the appraised estate or any part thereof for such duty and the decision of the surrogate Judge shall be final unless the property in respect of which such appeal is taken shall exceed in value the sum of \$10,000 when a further appeal shall lie," etc.

The notice given by the Treasurer in terms appeals from the whole appraisement which was upwards of \$190,000, although the only specific grounds set forth are limited to portions of it which are together less than \$10,000. The property however in respect of which the appeal is taken is the whole estate. When the amount of the original appraisement of the whole of an estate exceeds \$10,000, an appellant can always secure a further appeal by launching his appeal to the surrogate Judge against the whole appraisement, and in my opinion that is the effect of what has been done here by the Treasurer, and the appeal from the surrogate Judge therefore in my opinion is good.

In my opinion the word "person" in the 9th sec. of the Act includes the Treasurer of the Province who is a "person" appointed to hold that office under R.S.O. ch. 14: and he has the right to appeal.

As to the merits: the testator more than a year before his death, at a time when he was in comparatively good health conveyed the homestead in fee simple to his two daughters as a gift to them and the conveyance was at once registered. He was living with them in the house in question at the time: no change of possession took place and he and they continued to live together in the house until his death.

I do not think this conveyance was made "in contemplation

of death" within the meaning of sub-sec. (b) of sec. 4 of the Act. I think those words as they are here used must be held to refer to an actually impending death, and not to a case in which death was an event which was not expected to take place immediately or within a measured time. Here that was no reason to expect a fatal termination to any existing disorder. The testator was an old man, but he was not at the time under actual medical treatment, and he may well have expected to live, as he did, for a considerable time after making the conveyance in question.

In my opinion however the case comes within sub-sec. (c) of sec. 4 of the Act. That sub-section it is true is taken from an English Act and an amendment to it which have been unskilfully joined together in an Act. In the Acts from which they are taken the clauses here joined together are expressly confined to personal property and they are manifestly drawn in that view, for realty cannot be the subject of a *donatio mortis causæ*. But the interpretation clause 2 to the Act in our statutes, ch. 24 R.S.O. declares the word "property," used in the sub-sec. (c), to include both real and personal property and it is my duty therefore to apply the word to both species of property where it is possible to do so, and to hold that a conveyance of land is a disposition under the section. The disposition here was by way of gift and the donor was never excluded from possession or enjoyment of the property, but continued to live there as before until the time of his death. The learned surrogate Judge has come to the conclusion that the section must be taken to apply only to transfers made within twelve months of the death of the donor. I cannot bring myself to limit the section in this manner. The words "*including property taken under any gift whenever made*" are awkwardly chosen no doubt, in the connection in which they are used but they cannot be rejected, and their only meaning must be that the property referred to after the word "*including*" is to be subject to duty. I think therefore that the appeal of the treasurer must be allowed as to the homestead and that its value must be added to the appraisal.

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I see no ground for interfering with the valuation placed upon the stock of the Hamilton Park and Suburban Co. by the sheriff and approved by the surrogate Judge and the appeal as to this by the treasurer and the cross appeal by the executors must be dismissed.

There will be no costs of the appeal to either party.

G. F. H.

[DIVISIONAL COURT.]

D. C.
 1905
 Feb. 20.
 March 29.

SANDWICH EAST (NO. 1) ROMAN CATHOLIC SEPARATE SCHOOL
 TRUSTEES V. TOWN OF WALKERVILLE.

Separate Schools—Adjoining Municipalities—Three Mile Limit—Separate School Supporters—Notice—Recovery of Taxes.

Supporters of a separate school resident in a town may, by proper notice, become supporters of the nearest separate school in an adjoining rural municipality, within three miles distance; and the High Court has power, in an action brought by the trustees of the rural separate school section against the town corporation, to adjudge that taxes levied and collected from ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice, shall be paid over to the plaintiffs.
 Judgment of Boyd, C., varied.

ACTION for a declaration that the plaintiffs were entitled to have those of the ratepayers of the defendant municipality who gave notice that they were supporters of the Roman Catholic Separate School for section 1, Sandwich East, assessed and placed on the roll of the defendant municipality as supporters of that school, and to have the taxes collected from them applied to the support of that school, and for consequent relief, and for an account as to these taxes, and a number of minor matters.

The action was tried before BOYD, C., without a jury, at Sandwich, on the 22nd September, 1903, and written arguments were afterwards sent in.

J. E. O'Connor, for the plaintiffs.

J. H. Coburn, for the defendants.

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February 20. BOYD, C.:—Upon the question of law raised in the record and by the written arguments, I find in favour of the plaintiffs on this point, that the provisions of the Separate Schools Act, R.S.O. 1897, ch. 294, 'sec. 42, etc., * apply to the case of the contiguous municipalities of Walkerville and Sandwich East, that is to say, I think that the supporters of separate schools resident in Walkerville (where there is no separate school) may, by proper notice, become supporters of the nearest separate school in Sandwich East, within the limit of three miles distant from such school. This will practically withdraw such persons from contributing to the public schools of the town, and render them liable to be assessed for the maintenance of the nearest separate school in Sandwich East, which appears to be that controlled by the plaintiffs.

Upon the other question of law raised in the pleadings and argument, I am of opinion that the contention of the defendants is right; that is, it is not open for the Court to make or direct changes in the assessment rolls of the town for the year 1903, so as to change the body of ratepayers named, by withdrawing those who are found to be supporters of separate schools. That is a matter of detail to be regulated and adjusted by application for redress to the court of revision under sec. 49 of the Separate Schools Act, which is expressly framed to meet just such cases of complaint that one who is a separate school supporter is wrongfully placed upon or omitted from the roll.

* 42. (1) Every person paying rates, whether as owner or tenant, who, by himself, or his agent, on or before the first day of March in any year, gives to the clerk of the municipality notice in writing that he is a Roman Catholic, and supporter of a separate school situated in the municipality or in a municipality contiguous thereto, shall be exempted from the payment of all rates imposed for the support of public schools . . . within the city, town, incorporated village or section in which he resides, for the then current year, and every subsequent year thereafter, while he continues a supporter of a separate school; and the notice shall not be required to be renewed annually. . . .

43. Subject to the other provisions of this Act no person shall be deemed a supporter of a separate school unless he resides within three miles (in a direct line) of the site of the school house.

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This complaint may be by the person aggrieved, or by any rate-payer of the locality, but not in a subsequent year by the corporate body of trustees for the separate school section alleging themselves to be interested. I see no right of initiative to this body under the statute, nor do I know what *locus standi* they have to seek such relief in the High Court.

Beyond these declarations, no useful result can follow any more detailed consideration of the minor issues. Unexplained delay has arisen in submitting the case to me for decision, and many of its details have lost interest and pertinence from lapse of time. It was before me at Sandwich on the 22nd September, 1903, and the direction was given to tabulate evidence as to the notices and withdrawals of a mass of voters and send in, based upon this completion of the evidence, written arguments by the counsel engaged. This was because sufficient preparation had not been made for the disposal of the case, and with jury cases awaiting trial, I found that further time should not be engrossed by this case. I directed these arguments be put in without delay, but they have not been laid before me with the other papers till the 27th January, 1905.

For all practical purposes the judgment I now give is the only one that will be of any service to the parties, for the matters undisposed of are of slight importance, going back to the payment of \$6 from five different ratepayers in 1901.

Success being divided, I think there should be no costs to either party.

The defendants appealed from this judgment, in so far as it declared that the supporters of separate schools resident in Walkerville, where there was no separate school, might, by proper notice, become supporters of the nearest separate school in Sandwich East, within the limit of three miles from that school; and the plaintiffs appealed from the same judgment, in so far as it refused to direct payment of the taxes collected from separate school supporters to be made to the plaintiffs.

Both appeals were heard by a Divisional Court, composed of FALCONBRIDGE, C.J.K.B., MACMAHON and CLUTE, JJ., on the 28th March, 1905.

J. H. Coburn, for the defendants. Section 42 is very wide in its terms, but it is qualified by other provisions of the Act. The plaintiffs' school is a rural one, while Walkerville is an urban municipality. Section 28, sub.-sec. 9, of the Act makes provision for rural school sections applying to township councils; this is no warrant for applying to a town council. The town council is under no obligation to pay over any portion of the rates, because the trustees of a rural separate school section have no power to make a demand upon them. The town was incorporated in 1890; at that time there was no separate school in either municipality; this school section was afterwards formed. See *Arthur Separate School Trustees v. Township of Arthur* (1890-1), 21 O.R. 60.

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FALCONBRIDGE, C.J.:—We are all agreed that the judgment of the Chancellor is right upon the question raised by the defendants' appeal. That appeal will be dismissed with costs.

A. B. Aylesworth, K.C., for the plaintiffs, in support of their cross-appeal. The Court has jurisdiction to give effect to its declaration by ordering payment to the plaintiffs of the rates for 1903 collected by the defendants: *Nickle v. Douglas* (1875), 37 U.C.R. 51; *London Mutual Ins. Co. v. City of London* (1887), 15 A.R. 629; *In re Roman Catholic Separate Schools* (1889), 18 O.R. 606.

Coburn, in answer to the cross-appeal. The matter is one for the court of revision: *Confederation Life Association v. City of Toronto* (1894), 24 O.R. 643, 22 A.R. 166; *Re Ridsdale and Brush* (1862), 22 U.C.R. 122; *In re Dickson and Village of Galt* (1853), 10 U.C.R. 395; *In re Johnson and School Trustees of Harwich* (1870), 30 U.C.R. 264.

Aylesworth, in reply, referred to *Nottawasaga Public School Trustees v. Township of Nottawasaga* (1888), 15 A.R. 310.

March 29. The judgment of the Court was delivered by MACMAHON, J.:—We allow the plaintiffs' cross-appeal from the judgment of the learned Chancellor, and direct that the part of the judgment so appealed from be set aside, and judgment directed to be entered declaring that the plaintiffs are entitled

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to recover from the defendant corporation all taxes levied and collected for the year 1903 from all ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice to the said municipality of their intention to become supporters of the Roman Catholic Separate School for section No. 1 in the township of Sandwich East.

The parties should be able to agree as to the amounts collected by the defendants from the said separate school supporters. If not, there will be a reference to the Master at Windsor to ascertain the amount for which judgment is directed to be entered, together with the costs of the action and of this appeal. Should there be a reference, the costs thereof are reserved.

E. B. B.

[TEETZEL, J.]

RE WIARTON BEET SUGAR MANUFACTURING CO.

ALEXANDER MCNEILL'S CASE.

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April 20.

Company—Winding-up—Stock Issued as “Fully Paid-up”—Part Payment—Liability—Contributory—Set-off by Shareholder—Mutuality—R.S.O. 1897, ch. 191, sec. 37.

A certificate of 238 shares of stock was issued to one McN. described as fully paid up, pursuant to an understanding between him and the directors. He paid for 171 shares, and accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability in respect to them. There was no evidence of any application for them by him or of any allotment to him. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares:—

Held, that he was a shareholder with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares.

McN. had paid \$1,500 on a guarantee given for the company, and claimed to set-off that amount against his liability on the shares.

Held, that sec. 37 of R.S.O. 1897, ch. 191, has reference only to an action against a shareholder in the nature of a *sci. fa.* by a creditor of the company, and that its provisions do not extend the right of set-off to proceedings against shareholders under that Act, and that such right did not exist on the broad ground of absence of mutuality between the claim of the liquidator against McN. and the latter's claim as a creditor against the company.

The Maritime Bank v. Troop (1889), 16 S.C.R. 456, followed, and the judgment of King, J., in the court below referred to with approval.

THIS was an appeal by Alexander McNeill from that portion of the certificate of J. A. McAndrew, official referee, made in the winding-up proceedings of the Wiarton Beet Sugar Company placing Alexander McNeill upon the list of contributories for \$1,675 for a balance due upon 238 shares: and an appeal by the liquidator from that portion of the certificate allowing a set-off of \$1,500 for advances made by McNeill for the benefit of the company *pro tanto* against the \$1,675.

The appeals were argued in Court on the 1st of March, 1905, before TEETZEL, J.

G. H. Watson, K.C., for the appeal by McNeill. The evidence shews that the shares were to be issued by the company pursuant to an agreement by which \$50,000 of stock was to be

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subscribed, but they were irregularly issued before that amount was subscribed and so the condition was not fulfilled to make the issue valid. In any event they were issued as paid up shares by allowing a commission on them to one Spotton, which the company had a right to do even if they had no right to issue them at a discount: *In re Wragg*, [1897] 1 Ch. 796. The shares should have been first issued to Spotton and then transferred by him to McNeill when there would have been no liability on McNeill. There is no record in the books of the company of any application by or allotment to McNeill of the shares and he always understood there was no liability on them. I refer to *In re Macdonald Sons & Co.*, [1894] 1 Ch. 89; *In re Western of Canada Oil and Works Co.*; *Carling, Hespeler and Walsh's Cases*, 1 Ch. D. 115; *In re Innes & Co.*, [1903] 2 Ch. 254; *McCracken v. McIntyre* (1877), 1 S.C.R. 479; *Page v. Austin* (1882), 10 S.C.R. 132, at p. 149; *Kettle River Mines, Limited v. Bleasdel* (1900), 7 B.C.R. 507; *Bloomenthal v. Ford*, [1897] A.C. 156; *In re Johannesburg Hotel Co., Ex p. Zoutspansberg Prospecting Co.*, [1891] 1 Ch. 119.

W. H. Blake, K.C., contra. McNeill was aware that shares were being issued as bonus stock. They were issued, accepted and held by him and he should pay for them even if he were ignorant as to his legal liability: R.S.O. 1897, ch. 191 sec. 37. The evidence shews Spotton never earned any commission and never claimed any, and even if he had the arrangement was colourable as he was to hand it over: *Mosley v. Koffyfontein Mines, Limited*, [1904] 2 Ch. 108. The Court will not sustain a bargain to sell the stock at a discount. A reasonable commission is not *ultra vires*, but a sale of stock at discount is always illegal: *Metropolitan Coal Consumers' Association v. Scrimgeour*, [1895] 2 Q.B. 604. I also refer to Emden's *Winding up of Companies*, 7th ed. pp. 188, 189; *Ex p. Sandys* (1888), 42 Ch. D. 98; *The North-West Electric Co., Limited v. Walsh* (1898), 29 S.C.R. 33; *In re The Ontario Express and Transportation Co.* (1894), 21 A.R. 646.

W. H. Blake, also for the liquidator's appeal. The liability of McNeill to the company cannot be set off against the liability of the company to him to the prejudice of creditors.

Set-off can only be allowed where there are mutual debts held in the same rights. Section 37 of R.S.O. 1897, ch. 191 is not general in its application as the referee thought; it only applies to the case of a *sci. fa.* action. It carries the matter no further than sec. 57 of R.S.C. 1886, ch. 129: *Shaver v. Cotton* (1896), 23 A.R. 426; *The Liquidators of the Maritime Bank v. Troop* (1889), 16 S.C.R. 456. The principle of the decision in that case is found in the unreported judgment of King, J., in the Court below which the Supreme Court adopted: vol. 74 Sup. Ct. (bound) Cases; Emden's Winding up of Companies, 7th ed. pp. 236, 237. The only case apparently to the contrary is *Re Central Bank, J. D. Henderson's Case* (1889), 17 O.R. 110; there the question was not argued and no reasons are assigned for the decision. The appellate court does not deal with the point. If there was a conflict between the Dominion and Provincial legislation the Dominion must govern and Dominion insolvency legislation (as the wording of the Act is) can affect property rights: *Cushing v. Dupuy* (1880), 5 App. Cas. 409; *The Attorney-General of Ontario v. The Attorney-General for the Dominion of Canada*, [1894] A.C. 189.

Watson, contra. The Ontario Legislature has jurisdiction to enact the Ontario Companies Act, R.S.O. 1897, ch. 191 and to define the rights of incorporators, shareholders, etc. Sec. 37 of the Ontario Act and sec. 57 of the Dominion Act are not in conflict, but if they were, the rights of McNeill as a shareholder are created and governed by the Ontario Act. There is a debt due by the company to the debtor and by the debtor to the company. The set-off is a matter of right and the difference is all that McNeill can be called upon to pay.

Blake, in reply, cited *In re Overend Gurney & Co., Grisell's Case* (1866), L.R. 1 Ch. 528; *In re Paraguassu Steam Tramway Co., Black & Co.'s Case* (1872), L.R. 8 Ch. 254.

April 20. TEETZEL, J.:—On the 6th August, 1902, a certificate for 238 shares of the par value of \$25 each described therein as fully paid up and non-assessable, was issued to McNeill, but he in fact only paid to the company a sum equal to 171 shares, and the \$1,675 represents the par value of the remaining 67 shares.

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The records contained no evidence of an application by McNeill for these 67 shares, nor does there appear to have been any formal resolution allotting them to him; but I think the evidence is conclusive that they were issued in the same certificate with the shares that he had paid for, as bonus stock, in pursuance of an understanding between the directors and McNeill and others. In other words, I think, an effort was made to issue stock at a discount.

There is no doubt, I think, that McNeill had actual knowledge that the 67 shares were not paid for, and he received and accepted the certificate with that knowledge, but I have no doubt with the innocent belief that there would be no further liability cast upon him in respect of the shares.

After receiving the certificate for the 238 shares, he transferred one share and afterwards became and for several months continued to be a director of the company.

When he transferred the one share, he surrendered the certificate for 238 shares and obtained a new certificate for 237 shares.

He appears in the stock ledger and in the stock register as the holder of 237 shares, and in my opinion he is a shareholder in the company with all the rights and liabilities of such a shareholder, and having chosen to accept the certificate of ownership of these shares and having acted upon the same with full knowledge of all the facts, he cannot now repudiate his status as a shareholder in respect of them.

Under the facts of this case I do not think that *McCracken v. McIntyre*, 1 S.C.R. 479, or *Page v. Austin*, 10 S.C.R. 132, and other cases cited by Mr. Watson, can apply.

Whether he would be entitled to succeed in an action by the company which issued the stock as fully paid up shares it is not necessary to consider, but I think he has no defence to the application of the liquidator to put him on the list of contributories for the amount actually unpaid in respect of the shares.

In addition to the cases referred to in the judgment of the learned referee, *Mosley v. Koffyfontein Mines, Limited*, [1904] 2 Ch. 108, may be referred to. Also the authorities

cited in Emden's Winding up of Companies, 7th ed. pp. 188 and 189.

The appeal must, therefore, be dismissed with costs.

With reference to the liquidator's appeal, I am of opinion with much respect, that the learned referee was in error in allowing the set-off in question. According to his view, a shareholder in a company incorporated under the Ontario Act can set up against a claim by a liquidator for amount unpaid on his shares any debt due to him by the company, referring to section 37, chapter 191, R.S.O. 1897, sub-section 2 of which reads as follows: "Any shareholder may plead by way of defence, in whole or in part, any set-off which he could set up against the company except a claim for unpaid dividends, or a salary or allowance as a president or director of the company."

This has reference to any action against a shareholder in the nature of *sci. fa.* by a creditor of the company.

It was decided, in *Shaver v. Cotton*, 23 A.R. 426, that after a winding-up order had been made under the Dominion Act, a judgment creditor of a company cannot maintain an action against a shareholder for payment of the amount unpaid on his shares. At page 437, MacLennan, J.A., says, "Unpaid stock is an asset of the company, and the moment a winding-up order is made that unpaid stock has, in effect, been appropriated for ratable distribution among the creditors of the company. The order is, in effect, a judgment of a competent Court making such an appropriation, and it is binding on the company and also upon all the creditors and shareholders, and the object of the present action is to have the unpaid stock paid and applied contrary to the terms of that judgment. The winding-up order requires that the stock shall be applied to the payment of all creditors without preference or priority, while the action seeks to have it paid exclusively to the plaintiff."

To allow set-off by a shareholder who is also a creditor would violate the spirit and intention of the Winding up Act, the ruling object of which is the distribution of the assets of an insolvent company amongst its creditors *pari passu*, and I cannot construe the provisions of section 37 of The Ontario

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Companies Act as extending the right of set-off to proceedings against shareholders under the Winding up Act.

It is quite clear upon the authorities that unless said section 37 gives the right of set-off as against the liquidator there is no authority for allowing set-off.

No case was cited to me where the Act under which the company was incorporated contained a similar provision as to set-off, except *Re Mimico Sewer Pipe and Brick Manufacturing Co.* (1895), 26 O.R. 289, but in that case the decision was on another point, and the right of set-off seems to have been conceded without argument.

As regards the law allowing a set-off of one debt against another, as administered by the Courts whether of law or of equity, both in this country and in England, the mutuality between cross debts or demands has always been the underlying essential. I can find no case where it has been allowed in favour of a contributory shareholder as against a liquidator; but the cases are very numerous against such allowance.

In *The Liquidators of The Maritime Bank v. Troop*, 16 S.C.R. 456, the right of set-off referred to in section 57 of the Dominion Winding up Act is fully discussed by Patterson, J. Reference may also be profitably had to the very able judgment of King, J., in the Court below, which appears in volume 74 of the bound cases in the Supreme Court of Canada. See also cases collected in Emden's *Winding up of Companies*, 7th ed. pp. 236-239, and Masten, p. 653.

There was a good deal of discussion upon the argument, as to the effect of the winding-up of the company upon rights conferred upon shareholders by the Ontario Act, Mr. Watson contending that the Ontario legislature had the power and did define his client's right in the statute under which the company was organized, among those rights being the right of set-off against the company, and any creditor suing in respect of unpaid stock, and that these rights could not be curtailed by Dominion legislation.

Against this argument Mr. Blake contended, that the Winding up Act is in the nature of insolvency legislation, and within the exclusive jurisdiction of the Dominion Parliament, and therefore in passing such legislation it would be competent

to modify or alter the status of a shareholder in his capacity of creditor, so as to secure ratable distribution of the company's assets among all creditors; see *Cushing v. Dupuy*, 5 App. Cas. 409; *Tennant v. The Union Bank of Canada*, [1894] A.C. 31; but I do not deem it necessary to decide this point, as I think the right of set-off does not exist, on the broad ground of absence of mutuality between the claim of the liquidator against McNeill, and McNeill's claim as a creditor of the company, for the reasons fully discussed in the *Troop Case* above cited.

The liquidator's appeal will therefore be allowed, with costs.

G. A. B.

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WALSH V. FLEMING.

1905

May 3.

Will—Devise—Divesting—Executory Devise—Failure of—Residuary Devise—
R.S.O. ch. 128, sec. 27.

A testator died in 1880, having by his will devised to his wife "all my real estate consisting of" (the lots in question and other lots) "and also all other real estate and the personal estate which I may die seized or possessed of (1) To hold the same for the benefit of my said wife for life. (2) After the death . . . of my said wife as aforesaid to hold the same for my daughter . . . during her life . . . allowing her full free use of my said personal estate and all the rents and profits, . . . (3) From and after the death of my said daughter . . . to divide the said real and personal estate between her children in such manner as she shall by her last will and testament direct and appoint and in default of such appointment to divide the same equally between the said children, . . . (4) Notwithstanding the directions hereinbefore contained I desire that if my son . . . returns to Toronto within five years from the date of my death my said executors shall hold in trust for him from the time of his return" . . . (the lots in question) "during the term of his natural life and shall pay over to him all rents, issues and profits thereof and after his death shall divide the same between his children."

The son returned within the five years. The widow died in 1902 not having married again. The son entered into the receipt of the rents and profits of the lots devised to him and died in 1904 intestate and unmarried:—

Held, that the contention that at most the prior interest had only been divested to the extent of the executory devise to the son for life and on his death without children the purpose of the devise was satisfied and the estate revested in the first devisees could not prevail, as the gift over was of the entire interest in the lots named, and the contingency upon which the gift over was to take effect was the son's return, and the failure of the executory devise to his children resulted only in a lapse of that devise; but *held* that the expression "also all other real estate and the personal estate of which I may die seized or possessed" clearly manifested the testator's intention that there should not be a partial intestacy, and that paragraph 1 of the will contained a residuary devise, within the contemplation of sec. 27 of the Wills Act, R.S.O. ch. 128, and no contrary intention appearing, it was sufficiently comprehensive to "sweep up" the lapsed devise and pass it to the daughter.

THIS was an action for the construction of the will of one James Orford, and for an account of the rents and profits of the estate heard by way of motion for judgment in Court on the 27th February, 1905, before TEETZEL, J.

J. E. Jones, for the plaintiff. The son William Orford having returned, his share was divested from the original devise and became his property absolutely for his life with remainder to his children, and he having died unmarried and intestate, there was an intestacy as to his lots. The contingency was his return within the five years and that took place:

Robinson v. Wood (1858), 27 L.J. Ch. N.S. 726; *Doe d. Blomfield v. Eyre* (1848), 5 C.B. 713; *Jones v. Davies* (1880), 28 W.R. 455; *Gatenby v. Morgan* (1876), 1 Q.B.D. 685; *Crozier v. Crozier* (1873), L.R. 15 Eq. 282; *Re Monk, Monk v. Croker*, [1900] 1 Ir. R. 56; 24 Am. & Eng. Ency. of Law, 2nd ed. "Remainders"; Powell on Devises, vol. 2, p. 240; Jarman on Wills, 5th ed. 825; *Jackson v. Noble* (1838), 2 Keen 590 is not in point; *Drummond's Executor v. Drummond* (1875), 26 N.J. Eq. 234, is opposed to *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388.

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B. Morton Jones for the defendants Walsh. The wording of the contingent devise to William Orford is identical with the wording of the devise to Lydia Fleming, and could not be said to be an estate "carved-out" of the gift to Lydia. The argument of presumption against intestacy does not apply, for even if it is held that the gift over fails to operate by reason of the death of William without issue, there is still a possibility of intestacy, no provision being made for the disposition of the devise to Lydia in case of her death without issue. There was an obligation on the executors to utilize impartially the funds directed to be raised for repairs: Beach on Trustees, p. 117; *Hurst v. Hurst* (1882), 21 Ch. D. 278.

A. Hoskin, K.C., for the defendant Britton. The daughter, Lydia Fleming, took an estate in fee subject to her mother's life estate, but subject also to its being divested, if the son William returned. The son did return and that contingency having happened if he had children they got the fee, and if he had no children there was an intestacy as to the named lots. The use of the word "notwithstanding" divested the gift and shewed the intention: *Watkins v. Weston* (1862), 32 Beav. 238; (1863), 3 DeG. J. & S. 434; *Whittell v. Dudin* (1820), 2 J. & W. 279, 22 Rev. Rep. 124; the daughter must only rely upon *Gatenby v. Morgan*, but there, the life estate was carved out of a fee simple; and the will having been made prior to the English Wills Act, gave the children a tenancy in common for life only. In *Jackson v. Noble* George died without issue before the first taker and so did not interfere with the estate. That case might have been an authority in point here if William had not returned.

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C. Robinson, K.C., and J. T. Richardson for the defendant *Lydia Jane Fleming*. The intention is evident and must govern. It was to make a provision for the son which might never be carried out; and the daughter was only to be interfered with to a sufficient extent to allow of the provision for the son. The estate cannot go to collateral heirs, and it never was the intention that those claiming now against the daughter should take, as those through whom they claim were alive at the time of the making of the will, and they were to take no benefit under it whatever. The court will not construe a will to cause an intestacy unless it is unavoidable. They referred to 29 Am. & Eng. Ency. of Law, 1st ed., vol. 29, p. 354; *In re Stone, Baker v. Stone*, [1895] 2 Ch. 196, at p. 200; Dig. of English Case Law, vol. 10, p. 1549; *Doe d. Blomfield v. Eyre*, 5 C.B. at pp. 746, 747.

E. Coatsworth, for the executor. The first clause in the will contains at the end of it a residuary devise to *Mary Ferguson Orford*. There cannot be an intestacy where there is a residuary devise: *Morton v. Woodbury* (1897), 153 N.Y. 243, *ib.* 47 N.E.R. 283; *Jarman on Wills*, 5th ed. 716. He also referred to 36 Vict. ch. 20 (O.). founded on 1 Vict. ch. 26 (Imp.); *Swart v. Gregory* (1857), 15 U.C.R. 335, at p. 336.

J. E. Jones, in reply, referred to *Theobald on Wills*, 5th ed. 427, 430, 570, *Schouler on Wills*, sec 521, and *Thayer's Cases on Evidence* 928.

May 3. *TEETZEL, J.*:—The testator died on the 22nd September, 1880, and the will is dated August 3rd, 1880. The testator was twice married, and at the date of his will there were living two daughters and one son, *William Orford*, by the first wife, and one daughter, *Lydia Jane Orford*, now the defendant *Fleming*, by the second wife.

The son, *William Orford*, left home a few months after his father's second marriage in 1860 and had never returned.

The portion of the will particularly in question are the first four paragraphs, which are as follows:

"I give, devise and bequeath unto my wife *Mary Ferguson Orford* all my real estate consisting of lots numbers one, two,

three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fifteen, sixteen, seventeen, eighteen, nineteen and twenty in said city of Toronto, according to a plan registered in the Registry office of said city of Toronto being a sub-division of lot number one on the north side of Beech street, and lots numbers one and two, on the east side of Parliament street according to a plan, number one hundred and eight, and also all other real estate and the personal estate of which I may die seized or possessed of or in any way entitled to, as follows :

1. To hold the same for the benefit of my said wife Mary Ferguson Orford during the term of her natural life or so long as she may remain my widow, allowing her the full and free use of all personal estate, and all rents and profits of my said real estate, such provision to be accepted in lieu of dower.

2. After the death or marriage of my said wife as aforesaid to hold the same for my daughter Lydia Jane Orford during her life for her sole benefit, free from the control of any husband she may have, allowing her full free use of my said personal estate, and all rents and profits of my said real estate.

3. From and after the death of my said daughter, Lydia Jane Orford, to divide the said real and personal estate between her children in such manner, as she shall by her last will and testament direct and appoint; and in default of such appointment to divide the same equally between the said children, conveying to each child his or her share, at such time as when he or she, being a son, shall attain the age of twenty-one years, or being a daughter, shall attain the age of twenty-one years or marries, and in the meantime to hold and apply the same for support and maintenance of the said children.

4. Notwithstanding the directions hereinbefore contained I desire that if my son, William Orford, returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him, from the time of his return to Toronto said lots numbers fifteen, sixteen, seventeen, eighteen, nineteen and twenty, and also said lot number one subject to the existing life estate of my said wife in a portion thereof*

*The wife already had a life estate in part of the property before the will was made.—Rep.

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during the term of his natural life, and shall pay over to him all rents, issues and profits thereof, and after his death, shall divide the same between his children, in such manner as he shall in his last will and testament direct and appoint; and in default of such direction or appointment, to divide said property equally between them, conveying to each child his or her share, when, if a son, he attains the age of twenty-one years, or a daughter, attains the age of twenty-one years or marries; and in the meantime to apply the proceeds of the same to the support and maintenance of said children."

The will appoints the wife Mary Ferguson Orford, executrix, and Samuel Platt, executor.

The son William Orford returned to Toronto within five years from his father's death, and entered into the receipt of the rents and profits of the lands devised to him. He died in 1904 without issue, never having married. The widow died in 1902.

The plaintiff and the defendants Britton and the Walshes are children of testator's two daughters by his first wife, also since deceased. The other defendants are the daughter, Lydia Jane, her seven infant children and one Galley appointed to act on the death of the surviving executor.

The plaintiff claims that upon the true construction of the will, the gift to William Orford for life and the remainder to his children was an alternative contingent gift, which when it became operative by the return of the said William Orford, entirely replaced, defeated and extinguished the prior gift to the defendant, Lydia Jane Fleming, and her children; and that upon the death of William Orford without issue, the property devised to him for life did not revert to Lydia Jane Fleming and her children, but devolved upon the plaintiff and the other heirs at law of the testator, as upon an intestacy.

On behalf of the defendants, Mrs. Fleming and the infants, it is claimed that the devise to William Orford was merely taken or carved out of the estate devised to the trustees for the benefit of Mary Ferguson Orford, and the defendant, Mrs. Fleming and her children, and that upon the death of William Orford, unmarried and intestate, the estate which was taken or carved out became exhausted, and the lands and premises therein referred to

then remained vested in Mrs. Fleming and her children for the estates given them under the will.

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To adopt the plaintiff's contention involves a conflict with the natural and reasonable presumption, that when a will is executed the testator does not intend to die intestate as to any part of his property, and, therefore, unless either by the language of the will itself, or by reason of some well settled rule of law, or construction, the court is driven to find intestacy, such construction should, if possible, be adopted as will avoid an intestacy.

The expression "also all other real estate and the personal estate of which I may die seised or possessed" in the first paragraph of the will manifests clearly the testator's intention, that there should not be a partial intestacy, and there is nothing in the language of the subsequent part of the will showing a contrary intention.

For the plaintiff, it was argued that the authorities establish a rule of law to the effect, that a vested interest, which is given over in certain events, is divested if those events happen, though the gift over may be void, or though the devisee to take under the gift over dies before the testator, or may never come into existence: citing *Doe d. Blomfield v. Eyre*, 5 C.B. 713; *Robinson v. Wood*, 27 L.J. Ch. N.S. 726; *O'Mahoney v. Burdett* (1874), L.R. 7 H.L. 388; *Hurst v. Hurst*, 21 Ch. D. 278; and other cases referred to on page 570 of Theobald, 5th edition.

In the first case, Parke, B., at page 476, says: "If a testator were to devise to A.B. in fee, and to direct, that, in the event of A.B. dying in the lifetime of J. S., the estate should go over to a charity, it surely is perfectly clear, that, if A. B. died in the lifetime of J. S., he, A. B., or, rather, his heirs, would lose the estate. The testator could not give to the charity, without taking away from the devisee. The testator, therefore, in such a case by his will, says: 'If A. B. die in the lifetime of J. S., I do not mean that A. B. or his heirs should any longer have my estate.' The estate of A. B. is, in such case, defeated, not by the giving over of the estate to a charity, but by the happening of an event on which the testator intended it should go over. So, in the case before us the testatrix . . . says, in

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substance : ' If my son John and his brother William die in their father's lifetime, I do not mean him (John) to have the property ; but give it to strangers.' That which defeats the estate of John, is, the death of himself and brother in his father's lifetime, and not the giving over of the estate to strangers. The reason why John's representatives cannot claim the property, is, that his mother expressly declared, that, in the event which happened, he should not have it."

Now, in the present case, the plaintiff contends, that the return of William within five years was the event upon which is to depend the divesting of the estate in the lands previously given to Lydia Jane and her children, and that event having happened, the previous devise of the same property is effectually cancelled for all purposes ; and there being no provision in the will for revesting in Lydia and her children in case William leaves no children, there is, consequently, by virtue of the above rule of law, an intestacy in the absence of a residuary devise.

Theobald's *Law of Wills*, 5th edition, at page 571, citing *Gatenby v. Morgan*, 1 Q.B.D. 685, in discussing the above rule points out, that a distinction must be drawn between a gift over of the whole of a prior interest in certain events, and a gift over of a portion of the prior interest in certain events. In the latter case, the prior interest is divested only so far as is necessary to give effect to the gift over. This proposition of law was relied upon by counsel for the Flemings as being applicable to this case ; and it was argued, that at most, the prior interest had only been divested to the extent of the executory devise to William for life ; and that upon his death without children, the purpose of the devise was satisfied, and the estate thereupon revested in the first devisees.

With not a little hesitation, I am not able to support this view, for the gift over was not of a portion but of the entire interest in the lots named, and the contingency upon which the gift over was to take effect was William's return, and, I think, the failure of the objects of the executory devise to his children resulted only in a lapse of that devise.

No express provision having been made for the contingency of William leaving no children, the question is, whether the

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devise to them having failed falls into the residue under sec. 27 of the Wills Act, and to be held by the executors after the death of the widow, for the benefit of Mrs. Fleming and her children, under the first three clauses of the will.

Section 27 of the Wills Act reads as follows:

"27. Unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

The questions, therefore, are: (1) Whether in this will there is a residuary devise; and (2) If there is, whether there appears in the will any contrary intention to the lapsed devise being included in such residuary devise.

Upon a re-argument of this branch of the case, counsel for the plaintiff and for the defendants in the same interest, contended that the will contains no residuary clause within the contemplation of sec. 27, and it was argued that the whole devise was a general one to the executors to hold specific portions for certain objects, and that upon failure of one of these objects the lapsed interests must be held by the executors in trust for the heirs at law and could not revert to another specific devisee of the balance of the trust; further, that the language of the will does not constitute a residuary devise as distinct from a general devise with specific objects, and that in any case the devise to William was taken out of the general or residuary devise and upon lapse cannot be again covered by it for the benefit of the devisees therein mentioned.

The case chiefly relied upon in support of these contentions was *Springett v. Jennings* (1871), L.R. 6 Ch. 333. In that case, the testatrix gave certain lands in the parish of H. to A., B. and C., as joint tenants in fee, and devised to the plaintiff "the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments in the parishes of," etc.

The devise to A., B. and C. having been declared void, as made on a secret trust for a charity, it was held that the lands comprised in that devise did not pass under the gift of "the

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rest of my freehold hereditaments in the parish of H." but were undisposed of.

The difficulty in that case was the territorial limitation of the residuary devise, the devise having been limited to the rest of her freehold hereditaments in certain parishes, and it was not what Sir G. Mellish, L.J., seemed to think sec. 25 of the English Act (which corresponds to sec. 27 of our Act) contemplated, namely, "an universal residuary devise, that is to say, a devise of all the residue of testator's lands," p. 338.

The effect of this decision was, that there were two specific devises, and that when one of them had failed, the other did not sweep in the property included in the first.

This case was explained and distinguished in *In re Mason, Ogden v. Mason*, [1901] 1 Ch. 619, affirmed in [1903] A.C. 1, reversing *Kekewich, J.*, [1900] 2 Ch. 196, who, on the authority of *Springett v. Jennings*, had held that the devise there in question was not universal, and did not include copyholds.

The Chancery Division and the House of Lords held that a devise of the residue of or the remainder of the freeholds or of all other the freeholds of the testator is a good residuary devise, within the meaning of sec. 25 of the Wills Act (Imp.), though it does not extend to copyholds, and that a previous devise to a son which became void, because he attested the will of the testator, fell into the residuary devise.

Before the passing of our Wills Act, a will was ineffectual to pass real estate acquired by the testator subsequently to the date of the will, or real estate, comprised in specific devises which failed by lapse.

Stuart, V.C., in *Carter v. Haswell* (1857), 26 L.J., Ch. 576, at p. 577, in speaking of the effect of the provisions of the English Wills Act, which are similar to ours, says: "The prevailing opinion is, that the legislature intended, by this enactment, to assimilate the law, as to residuary devises of real estate, with that of residuary gifts of personal property, which had long been settled to comprise every legacy which failed by lapse or by being void *ab initio*."

In the last mentioned case, where a testator gave all his real and personal property to trustees upon trust for his sister, pro-

vided always, and he thereby directed that three several farms therein respectively described should be sold, and the proceeds applied to purposes prohibited by the Statute of Mortmain, it was held that the farms so directed to be sold passed to the testator's sister, as part of the general devise for her benefit.

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I think this case is a strong authority against the plaintiff's contention here.

In speaking of the provisions of the English Wills Act, similar to ours, in the *Mason* case, page 2, [1903] A.C., the Lord Chancellor says: "I should be very sorry indeed to place upon this remedial statute (which is intended to do the very thing which it is suggested this language does not do—that is, to enable the testator to sweep up everything not properly disposed of before) such an artificial meaning as to take away from the persons intended to be benefited that which they were meant to have. To my mind there is no doubt in the world that what the testator meant to do was that which, I think, he has done."

The provisions of the Wills Act in question being of a remedial nature, I take it that in ascertaining whether a devise amounts to a residuary devise within the meaning of the Act, two well established rules of construction must be applied: *first*, that remedial statutes should be construed liberally and not strictly; and, *second*, not to impute to a testator the intention of dying intestate, or, as expressed by Lord Esher, M.R., in *In re Harrison, Turner and Hellard* (1885), 30 Ch. D. 390 at page 393, "There is one rule of construction, which, to my mind, is a golden rule, viz., that when a testator has executed a will in solemn form you must assume he did not intend to make it solemn farce, that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule."

These two rules, as all other rules of construction, must, of course, bend to the fundamental rule, namely, that the intention of the testator, as gathered from the whole will, is to govern.

Now, in the light of these rules of construction, I am of opinion that the will in question does contain a residuary devise

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in language sufficiently comprehensive to "sweep up" the lapsed devise in question.

As stated by Jessel, M.R., in *Blight v. Hartnoll* (1881), 23 Ch. D. 218, at page 222, "You may have your residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will." In that case the testatrix gave to C. H. all her personal property except a certain wharf, which she bequeathed to other persons charged with certain debts and annuities. The bequest of the wharf failed for remoteness, and it was held that the wharf fell into the residue and belonged to C. H.

At page 220, Fry J., says: "I take the rule to be plain that in general the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect, but that is subject to this other rule, that if the testator has shewn some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention."

I also think this case a strong authority against the plaintiff's contention, for I think the effect of the language contained in this will is in the first instance to give all the lots specifically mentioned, and all the residue of testator's estate as stated in the first three clauses of the will, except lots 15, 16, 17, 18, 19 and 20, which in the event of William returning are to be held as in paragraph 4. In other words, I cannot construe the words, "notwithstanding the directions hereinbefore contained," etc., as having any greater effect upon the limitations of the residuary clause in paragraph 1, than if the devise contained in paragraph 4 had been engrafted on paragraph 1, as an exception from the general and residuary devise therein contained.

The fact that the residuary clause is in the first paragraph of the will, instead of in the last, is not of controlling consequence and can have no effect except as it bears upon the question of the intent of the testator. "Though the residuary clause is usually, it need not necessarily be, the last in the will, and any particular bequest which follows that clause may, if

made to different legatees, reasonably be read as an exception out of the property comprised in it:" *Morton v Woodbury* 153 N.Y., 243 at page 252, where the authorities are cited for the above proposition.

I can find nothing in this will affording the slightest evidence of a contrary intention on the part of the testator to exclude this lapsed devise from the residuary devise which I find the will contains.

This construction enables the Court to give effect to what seems to have been two prominent ideas of the testator, namely, (1) Not in any event to die even partially intestate; and (2) To provide for his son William and his children, if any, in the event of his returning within five years.

In this view of the construction of the will it is not necessary for me to deal with the question of accounting and repairs under paragraph 6.

The action will therefore be dismissed, but I think it is a proper case for the costs of all parties to be paid out of the estate, and judgment may be entered in favour of the defendant Fleming and her children, as above indicated.

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BURSON V. GERMAN UNION INSURANCE COMPANY.

May 23.

Fire Insurance—Foreign Company—Delivery of Policy—Cause of Action Enforceable in Ontario—Place of Payment—Home Office—Lex loci contractus—R.S.O. 1897, ch. 203, sec. 143.

The insured residing in Ontario applied through an insurance broker in Montreal for an insurance policy on property in Ontario in the defendant company, which was incorporated under the laws of one of the United States and had its home office in that State. The evidence of the insured was that he received the policy through the mail from the broker—and the evidence of the company was that it was delivered to the broker as the assured's agent who was not an agent of the company which had no agent or officer in Ontario. No place of payment was named in the policy:—

Held, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario; and that in the provision as to committing a policy to the post office the words "to be delivered or handed over to the assured, his assign or agent in Ontario" in sec. 143 of ch. 203, R.S.O. 1897, contemplates a committing to the post office of the policy by the insurer addressed to the insured his assign or agent in Ontario; and the provision therein, that in such event the money should be payable at the office . . . in Ontario shows that the section was intended to apply to companies having an office or agent in Ontario and not to a company which has in no way brought itself or its business within the limits of the Province.

Held, also, that the company not having complied with the Insurance Act R.S.O. 1897, ch. 203 in regard to license or registration, was precluded by sec. 85 of that Act from entering into a contract with any one in Ontario.

THIS was an action brought by an assignee for the creditors of the insured, and a bank to whom the loss was payable, for a loss by fire under a policy of insurance of the defendant company.

The trial was commenced before TEETZEL, J., without a jury, at St. Catharines, on the 21st of June, 1904, and was continued on the 22nd, 23rd, and 24th, and adjourned to Toronto, where it was completed on the 5th of May, 1905.

R. McKay, for the plaintiffs.

D. L. McCarthy, and *Frank Ford*, for the defendants.

The facts are set out in the judgment.

May 23. TEETZEL, J.:—The plaintiff Burson is assignee for creditors of George Wilson & Co., and the moneys payable under the policy of insurance sued on are payable to the plaintiffs, the Quebec Bank, as their interest may appear.

The trial of the action was commenced before me at St. Catharines in June, 1904, when the defendant, having refused to admit the policy, the trial was postponed to enable the plaintiffs to obtain evidence under a commission to prove the policy.

The defendant company was incorporated under the laws of the State of Delaware, and the home office of the company is at Wilmington in that State, but the president and secretary reside in Chicago, where the policy was executed.

Wilson & Company, of St. Catharines applied for this policy through one Nairn, an insurance broker carrying on business in Montreal.

According to the evidence of the president of the defendant company, taken under commission, Nairn was not an agent of the company, nor had the company any agent or officer in Ontario or any part of Canada.

By order of a Divisional Court, made on the 24th March, 1904, on an appeal from an order of Britton, J., dismissing an appeal from the Master in Chambers refusing an application to set aside an *ex parte* order made by the local Judge at St. Catharines allowing the plaintiffs to issue a writ for service out of the jurisdiction and to serve it on defendants at Chicago, it was directed that the defendants should be allowed to enter a conditional appearance to the writ; and it was further ordered "that the plaintiffs do prove at the trial of this action a cause of action upon which they are entitled to sue the defendants within the Province of Ontario to recover their claim in this action, and in default of their doing so, that this action be dismissed with costs."

No place of payment is named in the policy. In *Clarke v. Union Fire Insurance Company* (1883), 10 P.R. 313, and affirmed in (1884), 6 O.R. 223, it was decided that where no place of payment of a policy of insurance is mentioned in the policy, it must be assumed that the place of payment is where the head office of the said company is situated, and this fact may determine the question of the *lex loci contractus*.

Whether, therefore, the plaintiffs have proved a cause of action on which they are entitled to sue in Ontario depends upon whether the policy in question is affected by sec. 143 of

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ch. 203, R.S.O. 1897; for unless that section does apply, it is quite clear that "there has been no breach within Ontario of a contract wherever made which is to be performed within Ontario," as provided in Rule 1246, repealing Rule 162 (e) of the Judicature Act; and there is no element in this case to bring it within such cases as *Atkinson v. Plimpton* (1903), 6 O.L.R. 566; *William Blackley, Limited, v. Elite Costume Co., Limited* (1905), 9 O.L.R. 382, or *Duval v. Gans*, [1904] 2 Q.B. 685.

I am also of the opinion that said sec. 143 does not help the plaintiffs. That section reads as follows:—

"143. Where the subject-matter of any insurance contract is property, or an insurable interest within the jurisdiction of Ontario, or is a person domiciled or resident therein, any policy, certificate, interim receipt or renewal receipt, or writing evidencing the contract, shall, if signed, countersigned, issued or delivered over in Ontario, or committed to the post-office or to any carrier, messenger or agent to be delivered or handed over to the assured, his assign or agent in Ontario, be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all moneys payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insuring corporation, in lawful money of Canada, and this section shall have effect notwithstanding any agreement, condition or stipulation to the contrary."

The evidence bearing upon the delivery of the policy consists of that of the insured, Wilson, who swore that he received the policy through the mail from Nairn, and the evidence of the president of the defendant company that the policy was delivered to the assured's agent, Mr. Nairn. The evidence does not disclose whether such delivery was made personally in Chicago, or by mail in Montreal.

I think that the provision in sec. 143 as to committing a policy to the post-office "to be delivered or handed over to the assured, his assign or agent in Ontario," contemplates a committing to the post-office of the policy by the insurer addressed to the insured, his assign or agent in Ontario, and does not contemplate circumstances such as those in this case.

I further think that the provision that in such event the moneys should be payable at the office of the chief officer or agent in Ontario shews that the section was intended to apply to companies having an officer or agent in Ontario, and not to a company which has in no way brought itself or its business within the limits of Ontario.

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There was no evidence of any request or authority from the company to Nairn to forward the policy to Wilson, and I therefore think the plaintiffs have failed to shew that the policy in question was by or with the authority of the defendants "committed to the post-office to be delivered or handed over to the assured, his assign, or agent in Ontario," and therefore the plaintiffs have failed to prove a cause of action upon which they are entitled to sue in Ontario.

It should be noted that the address of the insured is not given in the policy, which simply insures "George Wilson & Company" for the term of one year against loss by fire to the amount of \$1,000 to the property therein described as located at St. Catharines, Ontario, Canada; loss, if any, payable to the Quebec Bank; and there is nothing in the evidence to shew that the defendant company knew that Wilson & Company resided at St. Catharines.

Even if I could find that it was intended by the defendants that the policy should be delivered to the insured at St. Catharines, within the meaning of sec. 143, I am of opinion that even then the plaintiffs have not proved a cause of action for which they are entitled to sue within Ontario.

Section 143 provides that in such event the contract shall be construed according to the law of Ontario.

It was conceded that the defendant company had not complied with the provisions of the Insurance Act, R.S.O. 1897, ch. 208, in regard to license or registration. Therefore, by sec. 85 of the Act, the company is prohibited from entering into any contract with any one in Ontario.

Applying the law of Ontario to the contract set up in this action, I think I should be bound to find that the plaintiffs had failed to prove a cause of action which they could enforce within Ontario. I think a portion of the policy of the Insurance Act is to prevent just such insurance contracts as this being

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enforceable in this Province—contracts that are commonly called “underground” insurance policies.

“Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court, either of law or equity, will lend its assistance to give it effect:” Chitty on Contracts, 14th ed., p. 548.

It was also held in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, that if an agreement contrary to the policy of the English law is entered into in a country by the law of which it is valid, an English court will not enforce it: see also *Kaufman v. Gerson*, [1904] 1 K.B. 591.

The action must therefore be dismissed with costs upon the ground that plaintiffs have shewn no cause of action upon which they are entitled to sue the defendants within the Province of Ontario to recover the amount of said policy.

G. A. B.

[DIVISIONAL COURT.]

THE SHEPPARD PUBLISHING COMPANY, LIMITED

V.

THE PRESS PUBLISHING COMPANY, LIMITED.

D. C.

1905

May 15.

Misrepresentation—Sale of Goods—Customers of Former Employer—Action—Slander—Case—Scope of Employment—Damages—Liability of Company—Judgment Against Joint Tort Feasors—Con. Rule 615.

The plaintiff company were the publishers of a Christmas Annual, and had for years been selling it at a considerable profit, the defendant T. being in their employ as a salesman or agent, and as such had visited and sold the annual to their customers. T. left their employment and entered that of the defendant company, who decided to issue a similar annual, and sent T. out as a salesman. He went to some of the customers of the plaintiffs and by untrue representations, amongst others that "the defendant company had taken over that part of the plaintiffs' business, and that the plaintiffs were going out of that branch of business," sold annuals to those customers to the detriment of the plaintiffs' business and to the profit of the defendant company, who accepted and filled the orders and collected the price.

On the answers to questions put to the jury, the trial Judge gave judgment against T. for the damages found, and granted an injunction against him and dismissed the action as against the defendant company:—

Held, that T. was acting within the scope of his employment in seeking to procure orders, and that the defendant company having availed itself of his acts, was liable for the representations made by him.

Held, also, that the action was not one of slander but an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiff, and that the defendant company, although incorporated, was liable.

Held, also, that the true measure of a master's liability is the same as if the act had been committed by himself, and the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damages against it.

Although if one of two joint tort feasors be sued and judgment recovered against him, that is a bar to further action against the two, here the action was brought against both and judgment obtained against one, and a motion for judgment was made against the other:—

Held, that both the company and the agent T. were liable.

The jury, in answer to a question in which they were asked in effect whether T. in uttering the words he did was acting within the scope of his employment by the company for their benefit, answered "No":—

Held, that the finding could not be sustained, and there being no reason to suppose that new light could be thrown on the case by a new trial, and the Court having before it all the materials necessary for determining the question in dispute, under Con. Rule 615 judgment was directed to be entered against both the defendants.

THIS was an appeal by the plaintiffs from a judgment of Anglin, J., at the trial, and a cross-appeal by the defendant Tibbs. The appeals were argued on the 13th of March, 1905, before a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

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E. F. B. Johnston, K.C., and *W. J. Elliott*, for the plaintiffs' appeal. The plaintiffs are entitled to a judgment against the defendant company as well as against Tibbs, the agent, who sold the publication and made the untrue representations. The evidence shews that Tibbs was the agent of the defendant company and made such untrue representations, and that the company had knowledge that he did so, and took advantage of his conduct for their own benefit and profit to the detriment of the plaintiffs' business. We do not claim that the action is one of slander, but rather of untrue representations: *Ratcliffe v. Evans*, [1892] 2 Q.B. 524; *Barley v. Walford* (1846), 9 Q.B. 197; *The Western Counties Manure Co. v. The Laws Chemical Manure Co.* (1874), L.R. 9 Ex. 218. As to the liability of the defendant company as a corporation, see *Green v. The London General Omnibus Co., Ltd.* (1859), 7 C.B.N.S. 290; *Ranger v. The Great Western R. W. Co.* (1859), 4 DeG. & J. 74; *MacKay v. The President, Directors and Co. of the Commercial Bank of New Brunswick* (1874), L.R. 5 P.C. 394.

W. R. Riddell, K.C., and *W. T. J. Lee*, for the defendant company, *contra*. The only evidence of the defendant company's knowledge was that of witnesses called on behalf of the other defendant, the agent, after the plaintiffs had closed their case against the defendants, and that evidence cannot be used in favour of the plaintiffs against the defendant company: *Ryland v. Jackson* (1902), 18 Times L.R. 574. There is no evidence of ratification by the defendant company, and they did not instruct the agent to do as he did: *Freeborn v. The Singer Sewing Machine Co.* (1885), 2 Man. L. R. 253. This is not an action on the case, but for slander, and slander will not lie against the defendant company: *Marshall v. The Central Ontario R. W. Co.* (1897), 28 O.R. 241; Townshend on Slander and Libel, 4th ed., par. 265; Odger's Law of Libel, 3rd ed. 435. The plaintiffs have taken a judgment against the agent and that is a bar to the judgment against the defendant company. The agent was not acting within the scope of his employment in making the representations. The whole scope of his authority and instructions was "To sell the publication on its merits, and make no bad debts." Clerk and Lindsell's Law of Torts, 3rd ed., pp. 56, 57, 58, 59-79; *Etna Life Ins. Co. v.*

Paul (1890), 37 Ill. App. 439; *Richards v. The West Middlesex Waterworks Co.* (1885), 15 Q.B.D. 660. They also referred to *Harding v. Greening* (1817), 8 Taunt 42; *Carroll v. Penberthy Injector Co.* (1889), 16 A.R. 446; *Washington Gas Light Co. v. Lansden* (1898), 172 U.S.R. 534.

D. O. Cameron, for the agent. The plaintiffs cannot take a judgment against both the defendant company and the agent, and if they succeed against the company that will discharge the agent: *Willcocks v. Howell* (1885), 8 O.R. 576.

Johnston, in reply, referred to *Barwick v. English Joint Stock Bank* (1867), L.R. 2 Ex. 259.

May 15. CLUTE, J.:—This is an appeal by the plaintiffs from that part of the judgment of Anglin, J., whereby he directed upon the answers to questions submitted to the jury, that the action be dismissed as against the Press Publishing Company, Limited, with costs; and asking that judgment be entered against both defendants, or for such other order as may seem fit; and there is a cross-appeal by the defendant Tibbs.

The case was tried with a jury at Toronto on the 1st, 2nd and 3rd day of February, 1905, when questions were submitted to the jury, on the answers to which the learned trial judge, as he was bound to do, under the authority of *Perkins v. Dangerfield* (1879), 51 L.T.R. N.S. 535, directed judgment to be entered against the defendant Tibbs for the sum \$180, and for an injunction as prayed, with costs of action on the High Court scale, and dismissing the action with costs on the High Court scale as against the defendants, the Press Publishing Company.

The plaintiff company carries on business in the city of Toronto as printers and publishers and is the proprietor and publisher of a paper called the *Toronto Saturday Night*, and it also publishes and sells to the publishers of newspapers throughout the Dominion of Canada, a publication known as an annual Christmas or holiday number, which is disposed of by such purchasing newspaper publishers as a Christmas or holiday number for their papers. The plaintiff company has been publishing the said periodical for many years and claims it to be an important and lucrative part of its business from which it has derived considerable profits.

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The defendant, Tibbs, was in the employ of the plaintiffs prior to November, 1903, in the capacity of salesman, selling the periodical above referred to, and in that capacity travelled each year through different parts of the Dominion of Canada and became personally acquainted with the plaintiffs' customers. He left the plaintiffs' employ in November, 1903, and entered that of the defendant company.

By its statement of claim, the plaintiff company charges that the defendant company decided to issue a publication under the name, "Christmas Number" similar to the said publication issued by the plaintiff, and to sell the same to publishers of newspapers to be issued by them as Christmas numbers for their various publications; that for the purpose of carrying out its said intentions, the defendant company sent out the defendant Tibbs as its salesman much earlier in the season than it was the custom of the plaintiff company to send out its salesman, and that the said Tibbs travelled as such salesman for the defendant company throughout the Dominion of Canada soliciting orders for the said publication for the said defendant company from the various customers from whom formerly he had solicited orders on behalf of the plaintiff company. It further charges that for the purpose of inducing the various customers of the plaintiff and others to give their orders to the defendant company for the said publication, the defendant Tibbs and the defendant company, through and by the said Tibbs as its accredited agent and representative, falsely and maliciously made to many persons untrue and fraudulent statements, as set out in the statement of claim, intending thereby to injure the trade and business of the plaintiff, and well knowing the same to be untrue.

The statements differed somewhat from each other, but were to the effect that the Press Publishing Company (the defendant company) had taken over the business of the Sheppard Publishing Company (the plaintiff) or that part of its business relating to the publication of the Christmas Annual, and that the plaintiff was going out of that branch of the business. These words, or words to the like effect, were spoken to the different publishers, Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis and Hogg.

The questions submitted to the jury and their answers thereto are as follows:—

1. Did the defendant Tibbs utter the words charged or words conveying the same meaning to Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis and Hogg, or any of them? Answer: Yes.

2. To which of these men did he utter such words? Answer: To all of them.

3. Did he utter them maliciously? Answer: Yes.

4. What damages do you find the plaintiffs have proved that they have sustained in consequence of each of the statements which you find Tibbs uttered? Answer: Wilson, \$50; Elliott, \$30; Featherston, —; Ellis, \$15; Gordon, \$20; Denholm, \$25; Fansom, \$15; Hogg, \$25.

5. Did Harkins,* knowing that Tibbs had uttered the words charged to Elliott, and knowing that they were false, and intending to do so, ratify what Tibbs had done? Answer: No.

6. Did Tibbs in uttering any of such words, which you find he did utter, act within the scope of his employment by the Press Publishing Company for their benefit? Answer: No.

7. What general damage, if any, do you find the plaintiff sustained in consequence of such statements charged, which you find Tibbs made? Answer: None.

Upon these questions and answers the learned trial Judge directed to be entered the judgment appealed from.

It is clear that Tibbs was employed by the defendant company to sell its Christmas Number, and as such agent was acting for and on its behalf and within the scope of his employment in obtaining orders for it, and the jury have found that he uttered the words charged maliciously. The defendant company received these orders and filled them and collected the subscription price; in other words, took advantage of the representations that were made by the defendant Tibbs.

It is doubtless upon the finding to the sixth question, that the learned trial Judge entered judgment in favor of the defendant company. But how could the jury properly find that

*Harkins was the manager of the defendant company.—Rep.

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Tibbs did not act within the scope of his employment? He was sent out for the express purpose of taking subscriptions for the Christmas Number, and in order to induce the persons mentioned to give their orders he made the representations charged. These representations were false in fact, and known by him to be false. They were acted upon by the persons to whom made, to the plaintiff's injury, to the amount found by the jury.

It cannot, of course, be disputed that Tibbs acted within the scope of his employment in seeking to obtain the orders, for he was sent out by the defendant company for that express purpose. He was acting, therefore, within the scope of his employment in seeking to procure the orders, but the mode or manner in which he sought to procure them,—in other words, the argument that he used,—was not authorized by the company. But can this make any difference? The defendant company had availed itself of his acts. It had adopted what he has done by not only accepting the orders, but when they were repudiated on this very ground by insisting upon their fulfilment. The company having, therefore, deliberately adopted the acts of Tibbs, ought to be held responsible for his acts of which it has taken advantage.

The recent case of the *Citizens' Life Assurance Company, Limited v. Brown*, [1904] A.C. 423, clearly lays down the principle, which, I think, governs this case. That indeed was an action for libel. The present action is an action on the case, but the principle is the same in both. Lord Lindley says (at pages 427 and 428): "The law upon this subject cannot be better expressed than it was by the Acting Chief Justice in this case. He said 'although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of his servant.' This doctrine has been approved and acted upon by this Board (in *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *Swire v. Francis* (1877), 3 App. Cas. 106) and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber, in *Barwick v. English Joint*

Stock Bank, L.R. 2 Ex. 259, which is the leading case on the subject. It was distinctly approved by Lord Selborne in the House of Lords in *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. at p. 326, and has been followed in numerous other cases." See also Lindley's Law of Companies, 6th ed., p. 257, and the cases there cited.

It seems clear that in the present case the representations made were within the scope of the agent's employment. "An act is said to be within the scope of the servant's employment when, although itself unauthorized, it is so directly incidental to some act or class of acts which the servant was authorized to do that it may be said to be a mode, though no doubt an improper mode, of performing them. For an impropriety or excess on the part of the servant in the course of doing something which was authorized the master will be responsible, but not for an act wholly unconnected with the class of acts which the servant was authorized to do": Clerk and Lindsell's Law of Torts, 3rd ed. p. 70; *Beard v. London General Omnibus Company*, [1900] 2 Q.B. 530. The master's liability for the unauthorized torts of his servant is limited to unauthorized modes of doing authorized acts: *Gracey v. Belfast Tramway Company*, [1901] 2 Ir. R. 322, and it will make no difference that the servant has express orders not to commit the impropriety. The master cannot discharge himself from liability by giving instructions to the servant as to the manner in which his duty shall be performed: *Limpus v. London General Omnibus Company* (1862), 1 H. & C. 526, at p. 538.

I am of opinion that the findings of the jury in answer to questions 1, 2, 3 and 4 and the undisputed facts of the case,—if there were nothing more,—entitled the plaintiffs to judgment against the defendant company.

It was argued by counsel that the defendant company was not liable because a corporation, it was said, is not liable in an action of slander, citing *Marshall v. The Central Ontario R.W. Co.*, 28 O.R. 241; Odger's Law of Libel, 3rd ed. 435. However that may be, I do not think the present action is one of slander. It is, in my opinion, an action on the case, although the pleadings take very largely the form of an action of slander.

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In the case of *Ratcliffe v. Evans*, [1892] 2 Q.B. 524, in an action for words not actionable *per se*, but constituting an untrue statement maliciously published about the plaintiff's business, Bowen, L.J., at p. 527, says: "The injurious statement complained of was a publication in the *County Herald*, a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. . . . That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title."

In *Riding v. Smith* (1876), L. R. 1 Ex. D. 91, it is stated by Kelly, C.B., at p. 93, where words were maliciously spoken in reference to the plaintiff's business, that the action though in form slander was "in substance not slander, but an action . . . founded on an act done by the defendant, which led to loss of trade and customers by the plaintiff."

The present action is, in my judgment, not slander but an action on the case for false and malicious statements made in reference to the plaintiff's business, and resulting in loss to the plaintiff. I can see no reason in principle why a corporation should not be held liable in such case for the acts of its servant or agent, acting within the scope of his authority.

It was urged, however, that the plaintiff must elect against which of the defendants it will take judgment,—if entitled against either,—but that it cannot have it against both. I do not think this position can be maintained. Both defendants are wrongdoers, one the master and the other the servant. The master takes advantage of the servant's acts and profits by it and is liable for his wrongdoing. Upon what principle then can it be said, that the servant is not to be held liable for his wrongdoing? It is a general rule in cases of tort, that all persons concerned in

the wrong are liable to be charged as principals. It is said by Willes, J., in *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259:—"But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad, improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of by-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the by-laws. . . . In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

This judgment has been approved of and followed in *Swift v. Winterbotham* (1873), L.R. 8 Q.B. 244; *Mackay v. The Commercial Bank of New Brunswick*, and *Swire v. Francis*, *supra*. See also Clerk and Lindsell's *Law of Torts*, 3rd ed., pp. 56, 57 and 69.

In *Limpus v. London General Omnibus Company*, 1 H. & C. 526, the defendant's liability was held to be unaffected by the fact that the servant had distinct instructions not to do the act complained of. Doubtless where the tortious act is done for some ulterior motive, *e.g.*, to gratify personal spleen and not in the interest of his employer, his principal is not liable: *Croft v. Alison* (1821), 4 B. & Ald. 590. It is not pretended in the present case that any ulterior motive induced the act.

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It was further urged by Mr. Riddell that inasmuch as the company had not made a profit out of the transaction, it was not liable to the amount of damages found against the defendant Tibbs. But this, I think, is not so. The true measure of the master's liability is the same as if the act had been committed by himself and is the amount of loss suffered by the plaintiffs by reason of the servant's wrongful act: Clerk & Lindsell's *Law of Torts*, 3rd ed., p. 80.

It was also argued on behalf of the defendant company, that judgment having been entered against Tibbs, that was a bar to further judgment against the company: *Willcocks v. Howell*, 8 O. R. 576. It is quite true that in acts of joint tort if one of the joint tortfeasors be sued and judgment recovered against him, that is a bar to the further action against his joint tortfeasors. But here the action was brought against both, judgment was obtained against one, and the plaintiff is now moving for judgment against the other. This it has a right to do: *Morel Bros & Co., Limited v. Earl of Westmorland*, [1904] A.C. 11, at p. 15. In the present case while the judgment had been settled and signed it had not been entered. I do not think there is anything in this objection.

The question remains—having regard to the answer given by the jury to question six—whether the case ought to be sent back for a new trial (in which case I think the jury should be struck out), or is one properly falling within Rule 615, where the Court has before it all the materials necessary for finally determining the question in dispute. Question six reads:—“Did Tibbs, in uttering any of such words which you find he did utter, act within the scope of his employment by the Press Publishing Company for their benefit? Answer: No.” Does this mean that he did not act within the scope of his employment and did not act for the benefit of the company, or does it mean that although he acted within the scope of his employment, yet in doing so, it was not for the company's benefit? Probably the former is what the jury intended. If the latter, then, in my view of the law, the plaintiff would, notwithstanding the answer to question six, be entitled to judgment against both defendants. But, assuming the answer to negative both branches of the question, can the Court upon the findings of

the jury and the admitted facts in this case, finally determine the question in dispute without sending the case back for a new trial ?

In *Hamilton & Co. v. Johnston & Co.* (1879), 5 Q.B.D. 263, the jury answered the questions in favour of the plaintiff, and judgment was entered accordingly. The Queen's Bench Division set aside the verdict, Cockburn, C.J., and Lush, J., being of opinion that all the necessary materials for finally determining the dispute being before the Court, judgment ought to be given for the defendants, notwithstanding the findings of the jury. This view of the rule was confirmed by the Court of Appeal, Lord Justice Bramwell observing: "At a trial with a jury there may be a misdirection by the judge, and there may be a wrong finding by the jury. In either case the party injured must apply for redress to the Divisional Court. That Court may think either that there has been or that there has not been a miscarriage; but the Court may also think that the most convenient course will be to decide upon the whole case, and that the proper materials being before them they ought to enter judgment in accordance with the view taken by them," p. 266.

Lord Justice Brett said: "I think it is quite competent for a Divisional Court to enter judgment upon special findings where the unsuccessful party has moved for a new trial, provided they have all the materials before them necessary for finally determining the questions at issue between the parties," p. 266. Lord Justice Cotton concurred.

The decision of the Queen's Bench Division was, however, reversed upon the merits. The rule under which this decision was made is the same as Rule 615, except a slight difference in the wording which does not alter the meaning. The English Rule was afterwards amended.

In *The Yorkshire Banking Co. v. Beatson & Mycock* (1880), 5 C.P.D. 109, upon the findings of a jury judgment was entered for the plaintiffs. That judgment was subsequently set aside and judgment entered for one of the defendants. Against this judgment an appeal was taken. The judgment of the Court (Bramwell, Baggallay and Thesiger, L.JJ.), was delivered by

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Thesiger, L.J., who says at p. 127: "The verdict and judgment for the plaintiffs have been properly set aside by the Court below, but is it right that the judgment entered instead for the defendant Mycock should stand? We have entertained some doubt whether the case ought not to go to another jury to be decided upon the principles laid down in this judgment, but we have come to the conclusion that the Court ought not to put the parties to this expense. The case is one in which no additional facts remain to be proved, and in which upon the facts proved no jury would be justified in finding a verdict adverse to the defendant Mycock. It is one, therefore, in which, to use the words of Rule 10 of Order XL. of the General Rules of the Supreme Court, we have before us, as the Court below had, all the materials necessary for finally determining the question in dispute; and in this state of circumstances we think that the judgment of the Court below should stand, and that the appeal should consequently be dismissed."

In *Lancey v. Brake* (1886), 10 O.R. 428, the Divisional Court set aside the judgment entered in favour of the defendant on the findings of the jury and entered judgment for the plaintiff. Chief Justice Wilson says, at page 442: "If the question was a new trial or no new trial, I should say there ought to be a new trial, for the evidence is most unsatisfactory for the defendant, and the verdict is really against the evidence. But in my opinion there is no necessity for a new trial, ..."

"We think we have before us all the materials necessary for finally determining the question in dispute, ...; we direct that judgment be at once entered upon the evidence, even against the finding of the jury, for the plaintiff, for the amount of his claim, . . . with the costs of the action, and of this motion."

In *Stewart v. Rounds* (1882), 7 A.R. 515, the jury returned a verdict for the defendant, which the county court Judge in term set aside and directed judgment to be entered for the plaintiffs. An appeal was taken to the Divisional Court. The judgment of the county court Judge was confirmed, Wilson, C.J., observing that the Judge was authorized to enter the verdict he afterwards did, "although unquestionably that power must be most sparingly and cautiously exercised," p. 318.

Mr. Justice Osler, while of the same opinion, observed that: "This Rule ought not to be acted on where there is any reason to suppose that on a second trial further evidence may be adduced, or that the facts may be more fully brought out," p. 319.

In *McConnell v. Wilkins* (1885), 13 A.R. 438, in answer to questions submitted to the jury, the learned county court Judge entered a verdict for the plaintiff; in term a rule to set aside the verdict and enter a non-suit was made absolute. This judgment was confirmed by the Court of Appeal, Mr Justice Burton observing: "The learned Judge below was right in giving judgment as he did in favour of the defendants, instead of submitting the questions to another jury," p. 444. Mr. Justice Osler says, at p. 445: "I do not think the learned Judge exceeded his power in directing judgment to be entered for the defendants on the whole case under Rule 321 O.J.A."

In *Rowan v. The Toronto Railway Co.* (1899), 29 S.C.R., 717, it was held that as the Court had before it all the materials necessary for finally determining the question in dispute a new trial was not necessary.

In *Donaldson v. Wherry* (1898), 29 O.R., 552, the jury found a verdict in favour of the defendant Wherry and the action was dismissed as against him with costs. The plaintiff moved for a new trial upon the ground that there was no evidence to support the defence set up, and that the plaintiff upon the evidence was clearly entitled to succeed. An order was pronounced setting aside the verdict in favour of the defendant Wherry and ordering judgment to be entered against him for the amount of the plaintiff's claim with costs. An appeal was taken to the Divisional Court, which held that "The conclusion reached by the judgment appealed from is the only one which could properly be reached upon the evidence at the trial, and under Rule 615 the learned Judge appealed from had jurisdiction to direct the proper judgment upon the evidence to be entered, for he had before him all the materials necessary for finally determining the questions in dispute," p. 556.

In *Clayton v. Patterson* (1900), 32 O.R. 435, which was an appeal from the order of the senior Judge of York County, to the Divisional Court, Chief Justice Meredith, in giving

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judgment, says: "The decided cases establish that the power conferred by this Rule may be exercised though the result be to disregard the findings of the jury; but that it should be used with great caution: *Stewart v. Rounds*, 7 A.R. 515; *McConnell v. Wilkins*, 13 A.R. 438.

"The facts, which were not seriously in dispute, or though disputed as to which there could reasonably be but one conclusion come to on the evidence, were these," etc.: p. 436.

In *Jackson v. The Grand Trunk Railway Company* (1901), 2 O.L.R. 689, where two witnesses,—men without practical experience,—testified that in their opinion the engine was defective constructively, while eleven witnesses called by the defendants,—all men of practical experience,—testified that the engine was constructed in accordance with the best prevailing practices, the jury having answered the questions in favour of the plaintiff, judgment was entered accordingly. The Court of Appeal held that in a case of that kind, depending upon the weight to be given to scientific and expert testimony and not upon questions of credibility and demeanour, such a verdict could not stand and it was set aside and the action dismissed, Armour, C.J.O., dissenting. This decision was affirmed in the Supreme Court (1902), 32 S.C.R. 245. Armour, C.J.O., in dissenting, said: "I do not think we should take the extreme course of ignoring the finding of the jury, of depriving the plaintiff of his right to a trial of the case by a jury, and of taking the case into our own hands and dismissing the action," p. 703.

As pointed out above, Order XL, Rule 10, 1875, (Eng.) is the same in substance as Rule 615. The English Rule 10 was amended, and it now provides that "The Court may draw all inferences of fact not inconsistent with the findings of the jury," etc. This amendment is pointed out in *Sibbald v. Grand Trunk R.W. Co.* (1891), 18 A.R. 184, at 207 by Burton, J.A., who observes that no such power is given under our Rule. It should be noted, however, that some of the English decisions, e.g., *Hamilton v. Johnson*, *supra*, were given before the above amendment was made and when the English Rule was the same in substance as Rule 615.

In *Jones v. Hough* (1879), 5 Ex. D. 115, Bramwell, L.J., said:

"A great difference exists between a finding by the Judge and a finding by the jury. Where the jury finds the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury," p. 112.

The Court of Appeal held in *Millar v. Toulmin* (1886), 17 Q.B.D. 603, that on an appeal from an order of the Divisional Court, upon an application for a new trial, the Court of Appeal has power, under Order 58, Rule 4, if all the facts are before the Court, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. Lord Esher, M.R., pointed out the difference between Order XL, Rule 10, and this Rule, which provides that "The Court of Appeal shall have power to draw inferences of fact, and to give any judgment and to make any . . . such further or other order as the case may require," observing that "these words give power to give the judgment which ought to follow from the evidence produced at the trial," and not limiting the inferences of fact which may be drawn to inferences not inconsistent with the findings of the jury, as in Rule 10. The House of Lords, however, in *Toulmin v. Millar* (1887), 12 App. Cas. 746, doubted whether the Court of Appeal had this power. In *Ogilvie v. West Australian Mortgage and Agency Corporation, Ltd.*, [1896] A.C., 257, which was an appeal to the Privy Council from an order of the Supreme Court of West Australia, whereby certain findings of the jury and the judgment thereon were set aside and judgment was entered for the respondents, the Privy Council reversed the judgment of the Supreme Court and restored the judgment entered by the trial Judge. The Rule of the Supreme Court of that Colony is the same as our Rule 615, and Lord Watson, at p. 266, observes that "The Rule is a salutary and useful one, if it be kept within its proper limits. But it does not empower the Court, when and because it has set aside one or more findings which have been made matter of objection, to disregard or negative other findings of the jury which have not been objected to. . . . It is not improbable that the learned Judges who constituted the majority of the Full Court relied upon Order XXXVI., Rule 10, as warranting the course which they adopted in giving judgment; but, if that were so, they appear to their Lordships to have

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been under a grave misapprehension as to the import and effect of the Rule, In dealing with the question of estoppel, they altogether ignore the findings of the jury, and they decide against the appellant, upon their own view of the facts, which it is impossible to reconcile with these findings."

It is perhaps difficult to reconcile all of the Canadian cases with the later English cases and especially with the last case, [1896] A.C. 267, as to when the power given by Rule 615 ought to be exercised. But having regard to the facts in each particular case and the manifest object of the Rule, it would seem to be proper to exercise the power there given in any case in which, upon the facts known, no jury would be justified in finding a contrary verdict, and when there is no reason to suppose that on a second trial further evidence may be adduced or that the facts may be more fully brought out that might change the result, and provided all necessary materials are before the Court for finally determining the question at issue between the parties. The Court is not justified in discarding the finding of a jury simply because it is dissatisfied with them, nor can the Court be substituted for a jury in determining the facts where there is reasonable evidence pro and con, that ought to be submitted to a jury.

In the present case, taking the view that I do of the liability of the defendant company for the acts of its agent, and it being clear that the agent was acting in the course of his employment in canvassing for subscriptions, although he made statements which were not authorized by the company, no finding such as is found in answer to question six, can be sustained, nor is there any reason to think that new light can be thrown upon the case by a new trial. There can, therefore, be no object, so far as I can see, in sending the case back for a new trial, when from the view taken only one result ought to follow.

I am, therefore, of the opinion that judgment should be entered against both of the defendants with costs in the Court below and of this motion, and that the plaintiffs' appeal should therefore be allowed with costs, and the defendant Tibbs' appeal be dismissed with costs.

MEREDITH, C. J., and TEETZEL, J., concurred.

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[DIVISIONAL COURT.]

, DOLAN V. BAKER ET AL.

Timber—Sale—Contract—Time for Removal.

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In 1889 the plaintiff contracted with the defendant B., by an instrument under seal, to sell to the latter certain kinds of timber from the plaintiff's land, "now upon" the lots described, and so much thereof as the purchaser might see fit to cut and remove, with the right of entry "at all times" until removed, the timber removed to be paid for at certain specified prices:—

Held, that the agreement being silent as to the duration of the right to cut and remove, it must be exercised within a reasonable time; and B. and his assigns, not having attempted to exercise the right until 1903, should be enjoined from doing so.

ACTION for trespass to land, tried before MACMAHON, J., without a jury, at Bracebridge, on the 9th May, 1904.

F. E. Hodgins, K.C., and *T. E. Godson*, for the plaintiff.

C. E. Hewson, K.C., for the defendants.

MACMAHON, J. (at the conclusion of the hearing):—The plaintiff entered into an agreement under seal, dated the 19th December, 1889, by which he sold to the defendant Baker all the first-class sound merchantable saw logs and firewood timber on lot 24 in the 13th and lot 24 in the 14th concessions of the township of Medora, with right of entry by Baker and his assigns upon the lands at all times until the timber should have been removed, and to remove so much of the timber as the defendant Baker saw fit, in consideration of 50 cents per 1000 feet board measure, for all sound first-class merchantable saw log timber, and 25 cents per 1000 feet board measure for hemlock timber, and 10 cents per cord for number one firewood which he should see fit to remove. No time is mentioned in the agreement within which the timber is to be removed.

The plaintiff at the time of the execution of the agreement was paid the sum of \$15.

The agreement was registered in the registry office on the 24th March, 1898.

Baker never attempted to cut or remove any of the timber under the agreement, and on the 6th December, 1900, he

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assigned all his interest in the contract to the defendants Mickle, Dymment, & Son, who went on the lots, and cut in December, 1903.

There is no doubt that Mr. Baker read over the agreement to the plaintiff and his wife, and they signed it,—the latter to bar her dower,—and the plaintiff fully understood its effect. It is, I think, just as Mr. Baker stated, that when Dolan asked for an explanation as to what was meant by merchantable saw logs and firewood timber he was told that it comprised beech, birch, and maple. The plaintiff said there was no mention of oak or pine, and it is not alleged that any pine was removed from the premises.

The plaintiff was under the impression that the copy of the agreement which was afterwards sent to him, and which he received, was different from the agreement he had executed. He evidently overlooked the fact sworn to by Mr. Baker that the agreement was executed in duplicate, and taken by Mr. Baker to Gravenhurst in order that the affidavits of execution might be sworn before a commissioner. The duplicate, Baker says, he returned to the plaintiff, and I accept his statement as being correct. It would be the most absolute folly for one party to a contract to think of returning to another party to it a document representing the terms of a contract which were different from the document he was retaining and under which he was asserting his title, as the fraud would at once be discovered if he went on the land and attempted to do something he was not authorized to do under the agreement returned to the owner of the land. The plaintiff in fact said on his examination for discovery that he had no fault to find with the agreement, and was prepared to carry it out. He also stated he had made up his mind to stand by the agreement, and intended to have no law about it; and that he would have given Baker ten years to take off the timber. That, however, was after the lapse of the ten years. There is no doubt that it was represented to Dolan by Baker that he would commence to remove the timber from the land within a year, and it was because Dolan was greatly in need of money, and upon the assurance that operations would begin within the year to remove the timber, that he entered into the contract. Mr.

Baker says it was too late in the season when the agreement was entered into to commence operations for the winter, but he fully intended to do so within a year from the time the agreement was executed. He, however, stated to Dolan in the presence of Henry Jamieson that he would commence removing the timber the following spring.

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The plaintiff wrote a letter to Baker notifying him that he intended to go on and peel bark from the hemlock timber on the lot; but it was not stated on what part of the lot he intended to cut the hemlock. He also said that two years after the first notification he wrote another letter to about the same effect, and I find on his evidence that such a letter was written. I think the plaintiff is honest and stated what actually took place, and as to the writing of letters he is corroborated by his wife, who from her signature to the agreement appears to be a woman of some education; and from her appearance, and the way she gave her evidence, I conclude she was fully aware of the nature of the agreement which was being entered into.

There was no entry on the land by Baker or the other defendants until after ten years had elapsed from the time the agreement was entered into, and after the ten years had elapsed, the plaintiff offered to sell to a Mr. Middlebrook some of the oak, basswood, and pine, but he was forbidden by Mr. Baker to make the sale.

Mr. Ritchie, who was the scaler and measurer of the timber that was cut in December, 1903, says that on the 14th January last (1904), after scaling the timber that had been cut, he made up a statement and taking a copy of it to the plaintiff's house offered him the sum of \$40 and some cents, which he alleged was the amount to which the plaintiff was entitled under the agreement.

The plaintiff refused to accept it, saying that the time had elapsed when they could cut, and stated that the matter was in the hands of his lawyers.

The impression I now have is that the agreement was for a sale of the timber with a license to go on the land and cut, which at all events would expire at the end of ten years, after

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which any one who went on the land to remove the timber would be a trespasser. I would not like to decide that question off-hand, and will take time to look at the authorities cited.

June 25, 1904. MACMAHON, J.:—A further consideration of the case has convinced me that I was right in the opinion I entertained at the conclusion of the case, even if it could be successfully argued that under the agreement Baker had ten years in which to cut and remove the timber.

The present case bears some analogy to that of *Smith v. Stocks* (1869), 38 L.J. Q.B. 306, where "a gravel pit and a road to it were allotted to surveyors of highways under a local Act passed in 1798. The surveyors continued to take gravel from the pit till the year 1837, but from that year until the year 1863 they took no steps whatever to assert their rights over either the road or the pit. In the year 1837 the tenant of the plaintiff's predecessor in title filled up part of the pit with rubbish, and from that year until 1863 took the surface of it into regular cultivation. In 1839 another such tenant ploughed up the remaining portion of the pit, and from that time till 1863 this portion of the pit and the whole of the road were taken into cultivation by the plaintiff's tenants. In 1844 one of the plaintiff's tenants, who was in the occupation of the greater portion of the surface of the pit, was elected surveyor of highways, and held the office for one year:—Held,—the Court having power to draw inferences of fact,—first, that the plaintiff had by his tenants been in actual possession of the gravel-pit and road from 1837 to 1863, so that the title of the surveyors to the soil and their right to dig gravel had become extinguished by twenty years' adverse possession."

Here, Baker had the right to enter upon the land and remove the timber, but not having entered within the ten years, is certainly barred by the statute.

I have, however, reached the conclusion that there being no express agreement as to time, all that the vendee (Baker) was entitled to was a reasonable time within which to remove the timber. The plaintiff by the agreement sold to Baker "all the first-class sound merchantable saw logs and firewood timber now upon lots 24 in the 13th and 24 in the 14th concession

Medora which the purchaser may see fit to remove, together with the right of entry at all times until said timber shall have been removed." That means the merchantable saw logs, timber, etc., then on the land. It is not such timber as may be there five or ten years hence that they are entitled to remove. Before entering into the agreement, the plaintiff was told by Baker that he would commence to remove the timber within a year, and that was the reason why the contract was entered into by the plaintiff. And the right of entry "at all times," must mean within a reasonable time, having regard to the subject matter of the contract.

If the argument of counsel for the defendants were to prevail, the defendants could enter any time within twenty years and cut such timber as they might "see fit to remove," and if the timber in the meantime was doubling or quadrupling in value, the plaintiff was to permit its growing on the land during that period for the benefit of the purchaser. And if the purchaser refused to remove and pay for the timber within five or ten years, the vendor was powerless to sell; and if it was during that time destroyed by fire the loss fell upon him. The contract does not so fetter him as to enable the defendants to perpetrate such a grievous wrong.

There being no express stipulation in the agreement as to time when the timber was to be removed, there is an implied term that it was to be removed within a reasonable time. In *Nosotti v. Auerbach* (1898), 79. L. T. Rep. 414, Mr. Justice Bruce said: "When all the terms of an agreement are stated except the term as to the time when it is to be carried out, and there is no expressed stipulation as to time, then in the case of agreements relating to the sale of real property as well as in the case of agreements relating to the sale of personal property, it is an implied term that the agreement is to be performed within a reasonable time."

A reasonable time in which to remove the timber on the lot would, I consider, be four years.

It was urged on behalf of the defendants that because it was wild land and unenclosed, the plaintiff could not therefore be considered in possession and therefore trespass would not lie. It was settled thirty-five years ago, in *Davis v. Henderson*

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(1869), 29 U.C.R. 344, that in order to constitute possession of wild lands by the owner they need not be enclosed. That case has been followed in a long line of decisions, including *Heyland v. Scott* (1869), 19 C.P. 165, 170; *Mulholland v. Conklin* (1872), 22 C.P. 372; and *Steers v. Shaw* (1882), 1 O.R. 26.

The defendant Baker was, I consider, properly made a party defendant to the action.

There will be judgment for the plaintiff declaring that the defendants are not entitled to enter upon and are hereby restrained from further entering upon the lands in the pleadings mentioned, and from cutting or removing either saw logs or other timber therefrom.

Also that the plaintiff is entitled to recover from the defendants damages for having entered upon the said lands and cutting and removing timber therefrom; and also the damage occasioned to the said land (if any) by such cutting and removal.

If the parties cannot agree as to the said damages, there will be a reference to the local Master at Bracebridge.

There will also be judgment directing that the indentures of the 16th December, 1880, and of the 6th December, 1900, referred to in the pleadings, be removed from the files of the registry office of the district of Muskoka.

The plaintiff is entitled to his costs, including the costs of the reference.

The defendants appealed from this judgment, and their appeal was heard by a Divisional Court composed of BOYD, C., ANGLIN and MAGEE, JJ., on the 14th November, 1904.

C. E. Hewson, K.C., for the defendants. Notice must be given before "a reasonable time" begins to run. The wording of the contract is plain and it should be observed. The Real Property Limitation Act has no application. I refer to *Johnston v. Shortreed* (1886), 12 O.R. 633; *Armour on Real Property* (1901), p. 437; *Daily v. Stevenson* (1839), 5 O.S. 737; *Darby & Bosanquet on Limitations*, 2nd ed., pp. 296, 297, 310, 311.

F. E. Hodgins, K.C., and T. E. Godson, for the plaintiff, *contra*, cited *Ford v. Cotesworth* (1868), L.R. 4 Q.B. 127; *Leake*

on Contracts, 3rd ed., p. 710; Pollock on Contracts, 7th ed., p. 265; *McNeill v. Haines* (1889), 17 O.R. 479; *Handy v. Carruthers* (1894), 25 O.R. 279; *Summers v. Cook* (1880), 28 Gr. 179; *Wood v. Le Blanc* (1904), 34 S.C.R. 627; *Huffman v. Rush* (1904), 7 O.L.R. 346; *Styles v. Taylor* (1864), 14 C.P. 93; *Andrew v. Pearce* (1805), 4 B. & P. 158; *Court v. Walsh* (1882), 1 O.R. 167; *Smith v. Stocks*, 38 L.J.Q.B. 306; *Keyse v. Powell* (1853), 2 E. & B. 132; *Adamson v. Yeager* (1884), 10 A.R. 477.

Hewson, in reply, referred to *McKay v. Bruce* (1891), 20 O.R. 709; *Mykel v. Doyle* (1880), 45 U.C.R. 65.

February 6, 1905. BOYD, C.:—The sealed instrument is expressed in the form of a grant in fee simple, but it is not intended to create a perpetuity in the thing granted—it contains inherent limitations. The subject dealt with—"timber" to be cut—savours of the realty, and for that reason the contract requires to be manifested in writing so as to satisfy the Statute of Frauds. The grant or sale is not of *all* the trees, but of so much timber as the purchaser, his heirs, etc., may see fit to remove. It is further limited to "all the first-class sound merchantable saw logs and firewood timber *now upon*" the lots described.

There is further given the right of entry "at all times" until the said timber shall have been removed.

There is a special provision in these words, "the vendor before cutting or clearing *hemlock* on said lands shall give the purchaser written notice in each year of such intended cutting—to be given in each year and to apply only to the then ensuing season's cutting in clearing; and will not fall *bark trees* in bad places to the injury of the purchaser's removing the same."

The price was to be 50 cents a thousand b.m., except for hemlock, which was to be 25 cents, and for No. 1 firewood 10 cents a cord.

This deed was made on the 13th December, 1889, and was registered on the 24th March, 1898. This action was begun in 1904—the date of the issue of the writ is not given as it should be on the record—to restrain the cutting and removal of the

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timber by the defendants Mickle, Dymont, & Son, who are assignees of the first purchaser.

In 1890 the plaintiff gave notice of cutting and peeling hemlock, and a second notice of further cutting and peeling in the second year after the contract, but no action was taken by the defendant to remove and pay for the trunks, and they are lying decaying on the land.

In 1900, nothing having been done in the way of entering and cutting trees by the defendant, the plaintiff made sale of the timber to one Middlebrough, and then received a letter from the defendant Baker forbidding the sale.

On the 6th December, 1900, Baker sold and conveyed to his co-defendants all the timber covered by his deed of 1889, and in 1903 men went on to cut and remove all the timber under the defendants' orders, and in consequence this action was brought.

The defendant Baker was not on the place after he bought the timber, and no entry was made on the premises for over 10 years. The question is as to lots 24 in the 13th and 24 in the 14th concessions of Medora. The plaintiff lived on lot 24 in the 13th, and has cleared over 20 acres thereon from year to year since 1889; the lots adjoin, with bush on each lot, and the bush part is not enclosed; but it has been constantly used by the plaintiff for pasturing his cattle on and cutting down such small wood or trees as he wanted. There is sufficient evidence of his being, not only in legal, but in actual, possession of the whole.

These seem to be all the material facts as to the surroundings of the case.

According to the common law of England "timber" was strictly applicable only to three kinds of trees, oak, ash, and elm, because of their being fit and commonly employed for building purposes; but by custom other trees, such as birch and beech, were also considered timber because serviceable and used for the same purpose. We have the same varieties of trees in this country and others, which when of proper size are used for construction, and are treated as timber. In England, as a rule, nothing is considered to be timber unless of twenty years' growth; though in some places they judge by the size of the

trees, and those that have reached the dimensions of two feet in girth or six inches in diameter are classed as timber: *Whitty v. Dillon* (1860), 2 F. & F. 67; *Dunn v. Bryan* (1872), Ir. R. 7 Eq. 143; *Honywood v. Honywood* (1874), L.R. 18 Eq. 306.

As defined by Robinson, C.J., in *Miller v. Clark* (1852), 10 U.C.R. 9, 10, "timber means the trunk of the tree . . . or any part of it, while it exists in its solid state;" tops and limbs would be thus excluded. In the present contract, the evidence shews what was meant to be included in the term "timber." On the land were standing and growing varieties of trees such as pine, hemlock, oak, elm, ash, beech, birch, basswood, maple. The pine was not bought, as the defendant admits; the hemlock was to be cut and peeled for tan bark by the plaintiff, and the wood or trunk was to be purchased by Baker at a price fixed. It was understood apparently that the parts of trees cut and suitable for firewood were to be paid for also at so much a cord. It is not important now to consider whether all the hardwood was sold or only certain varieties; but everything not to be regarded as timber at the date of the contract was excluded; the words of description being "all the first-class sound merchantable saw logs and firewood timber now upon" the two lots in question. The growth of timber then existing was being dealt with, not a later growth.

Though the instrument gives a right to so much of the soil and for so long as is sufficient to sustain and nourish the trees sold till they are actually cut down, yet the substantial purport of the whole transaction is the sale of a merchantable commodity; the standing trees are to be turned into saw logs and timber; the conveyance severed them in law from the freehold; and the question now is whether the actual severance in fact should not have been within a reasonable time or within the period fixed by the Statute of Limitations for exercising a right of entry on lands. A right of choice is given to the purchaser—all trees are not sold, but such as he may see fit to remove. Should not this right of selection be exercised within reasonable limits of time? The parties had in contemplation a speedy removal, though no time is expressed in the writing. Both spoke of the purchaser's intention to enter upon the cutting the next year and the bringing up of a floating mill to the lake

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near the place for the purpose of cutting up the trees, and getting the firewood necessary for the mill from this place. The plaintiff's wife says that five years was spoken of as the limit, but the husband says that this was not mentioned, but that five years would have sufficed to get all off.

No cases can be expected in England on such a question as to timber; but they are not uncommon in the United States, where, as with us, timber is one of the chief products of parts of the country.

It appears to me that a very reasonable doctrine is laid down in a late case from the pine State in which the law is fully discussed, viz., *McRae v. Stillwell* (1900), 111 Ga. 65. An instrument in the form of a deed conveyed to the grantees at a price per acre "all the pine timber suitable for saw mill purposes" on lots described, with right of entry, etc., and no limit as to time. It was held incumbent on the grantees or their assignees to cut and remove such timber within a reasonable time from the sale, and that on failure to do so their interest ceased and determined; and further, that what would be a reasonable time for so doing was a question of fact to be passed upon and decided in the light of all the facts and circumstances surrounding the transaction. This decision was affirmed in a later case in the same volume of *Goette v. Lane* (1900), at p. 400. The same statement of law was made in Pennsylvania in a case decided in 1894, *Patterson v. Graham*, 164 Pa. St. 234, where the Court said: "Undoubtedly, in a contract for the sale of timber, where the parties intend a severance, and no time is fixed within which it is to be removed, the law implies that the grantee will remove it within a reasonable time, and . . . what is a reasonable time is to be determined by all the circumstances:" p. 241. In that case the delay of eleven years was held unreasonable. And again in Tennessee in 1902 was decided *Carson v. Three States Lumber Co.*, wherein the holding was that a sale of standing timber without stipulation as to time of removal gives only a reasonable and not an unlimited time: 69 S.W.R. 320. I think that the germ of what is now under consideration may be found in the words of Parke, B., in *Hewitt v. Isham* (1851), 7 Exch. 77, in which he says (p. 79): "Wherever trees are

excepted from a demise, there is, by implication, a right in the landlord to enter the land, and cut the trees at all reasonable times. If, indeed, he leaves them on the land for an unreasonable time, he does more than the law authorizes him to do."

More than a reasonable time elapsed in this case before anything was done by the purchaser. There was a conditional grant of so much suitable timber for saw logs as the purchaser might see fit to cut—it was contemplated that there should be the selection and cutting and removal of substantially the same growth of timber as was then on the land, and not trees subsequently maturing as timber—not, it may be, an immediate severance, but one not unreasonably remote; operations on both sides were contemplated forthwith, and the inaction of the purchaser is cogent evidence of his abandonment of the right to enter and cut.

I do not consider the case having regard to the application of the Statute of Limitations; on the other ground of unexplained and unreasonable delay, I think the judgment should be affirmed with costs.

ANGLIN, J.:—At the threshold of this case there lies a question of construction, the determination of which may prove decisive of the present appeal. Does the instrument of 1889, under which the defendants assert a still subsisting right to cut and remove timber from the plaintiff's lands, grant such right in perpetuity, or for any definite period? Unless its provision for a privilege of entry "at all times until said timber shall have been removed" implies a right of cutting and removal in perpetuity, the deed is silent as to the duration of the rights which it confers. The purchaser acquired not all the timber on the lands of the plaintiff, but such portions of certain classes of the plaintiff's timber then standing as the purchaser should select, his selection to be made by cutting and removing. The license to enter was to continue until the timber so selected had been removed. This provision for entry cannot mean more than that, for the purpose of cutting and removing the timber, the purchaser may at all times enter, so long as the right to cut and remove endures. That this is its real purport further appears by the qualifying words, "so long and so often as may

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be required for the purposes of this indenture," found towards the end of this provision. So read, it in no wise determines the duration of the right of removal, which, no other term of the agreement affecting it, remains indefinite. The covenants for quiet enjoyment, etc., are not efficient beyond the period during which the right to acquire property in the timber by cutting and removing it subsists. They neither define, limit, nor extend the duration of the right itself. In the absence of any express stipulation, the law implies the term that the removal must be within a reasonable time. For this the case of *Nosotti v. Auerbach*, 79 L.T. Rep. 414, cited by the learned trial Judge, and the cases mentioned in the judgment of my Lord the Chancellor, which I have had the advantage of perusing, are clear authorities. The unfairness to the vendor of any construction of the instrument, which would give to the purchaser an option to cut and remove, to be exercised at some indefinite future date, however remote, in effect tying up the timber forever for no consideration, unless the purchaser should see fit to exercise his rights over it, affords the strongest possible reason for believing that the parties never contemplated such an arrangement. The result attained by operation of law, there can be little doubt, is what was really intended.

In fixing what would be a reasonable time, the nature of the subject matter and surrounding conditions must be taken into account; without saying that the four years fixed by the judgment in appeal is not such a reasonable time limit, it must be manifest that whatever reasonable time the most liberal Court would allow had elapsed long before the purchaser or his assignees attempted to cut or remove any timber from the plaintiff's land.

On this short ground—without entering into the complex and intricate question of the application of the Statute of Limitations to such rights as the purchaser acquired—the judgment below must be sustained and this appeal dismissed.

MAGEE, J.:—I agree with the judgment of my Lord the Chancellor. There was here an implied condition that the timber should be selected and removed within a reasonable time. It would be intolerable that the vendor should be left

for an unreasonable time without the use either of his land or his money, and in ignorance even of what trees the purchaser might select, and so unable to sell or clear off any.

In *McNeill v. Haines*, 17 O.R. 479, the owner, who sold all the pine timber the purchaser might choose to take off during 20 years, was held liable for selling to another in 5 years. A vendor should not be left in such a position beyond the term he has agreed upon or which the law implies.

In *McGregor v. McNeil* (1882), 32 C.P. 538, where the timber was to be taken off during 1881, and the purchaser was held entitled to take away in 1882 what he had cut in 1881, Mr. Justice Galt expressly reserves his opinion as to the right of the purchaser to go upon the land after 1881 to cut the timber, although the sale was of all the pine timber on the land, and it was held to be a sale of personalty.

In *Johnston v. Shortreed*, 12 O.R. 633, the sale was of all the pine timber standing with a proviso that it should be cut and removed within 10 years. After the expiration of the 10 years, the vendor cut some of the pine and was held entitled to it as against the purchaser's assignee. It was held that it was a grant subject to a condition, and not a grant with a covenant back for removal within the time.

In *Steinhoff v. McRae* (1887), 13 O.R. 546, where the sale was found by the jury to be upon condition to be removed within two years, it was held that the sale being subject to a condition, there was no right in the purchaser to remove after the two years, but if it had been a sale with a promise back, the omission to cut would not revert the property in the vendor.

In *Pease v. Gibson* (1829), 6 Greenl. (Me.) 81, the owner, under seal, agreed to let the purchaser have all pine trees fit for logs, he to have two years to take them off; it was held that it was a sale of so much only of the timber as the purchaser might take off in the two years. The same was held in *Reed v. Merrifield* (1845), 10 Met. (Mass.) 155, where the deed sold and conveyed all the timber upon a lot, the vendor to have 5 years to get it off.

In *Boisubin v. Reed* (1866), 1 Abb. Ct. App. Dec. (N.Y.) 161, the deed granted, bargained, and sold to the

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purchaser, his heirs and assigns, all the oak and pine timber of a certain size and also the right to enter during 10 years. The purchaser's assignee cut logs during the 10 years, and was held not entitled to enter after the 10 years to remove them. Leonard, J., says: "Had there been no term named, the vendor would be entitled to enter and carry away timber for a reasonable time, which would have depended for its limit upon the facts of the case."

It is to be noticed that in that case the Chief Justice considers the old case of *Stukeley v. Butler* (1615), Hob. 168, which was referred to in *Johnston v. Shortreed*, 12 O.R. at p. 636, to be overruled by American cases.

Now here the parties did not agree upon a time, but the learned trial Judge fixed 4 years as a reasonable one under the circumstances.

Thirteen years had elapsed without the purchaser doing anything towards cutting or removing the timber. In 1900 he knew that the vendor considered his right at an end, and had sold to another, and some correspondence ensued, the nature of which is not shewn. Then nothing more is done till in July, 1902, the defendants Mickle, Dymont, & Son, who had taken an assignment of the timber from Baker in December, 1900, came on the land, and the plaintiff promptly denied their rights. Only a nominal sum had been paid, the trees were unselected, and the law would properly imply the condition that the purchaser should have exercised his rights within a reasonable time.

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[IN THE COURT OF APPEAL.]

CANADIAN PACIFIC R.W. CO. ET AL. V. RAT PORTAGE LUMBER CO.

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March 17.

Execution—Seizure of Product of Timber—Permit to Execution Debtor to Cut and Remove from Crown Lands—Lien—Partnership—Interest of Partner.

An execution debtor was the holder of a permit to cut and remove railway ties from Crown lands. He entered into partnership with another person in the business of tie manufacturers, to be carried on upon the lands comprised in the permit, and the partnership got out ties to fill a contract with a railway company. The ties were seized by a sheriff under the execution against the debtor, and claimed by the partnership. It was conceded that the execution was not a lien upon any of the timber embraced in the permit until severed, but it was contended that the moment there was a severance the timber cut vested in the debtor, and *eo instanti* the execution attached:—

Held, that there could be no objection to the execution debtor forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials necessary to enable the work of production to be proceeded with. The product would be the property of the partnership, and not that of the individual who held the permit. Such an agreement was not in its nature either void or voidable as against creditors. The interest transferred by the debtor was not exigible under a writ, and was not affected by any lien or charge arising therefrom.

The execution creditors were entitled to seize the partnership interest of their debtor, but no claim of that kind was before the Court.

APPEAL by the defendants from a judgment of FALCONBRIDGE, C.J.K.B., pronounced on the trial of interpleader issues wherein the plaintiffs were claimants and the defendants contestants.

The issues arose out of the seizure by the sheriff of the district of Rainy River of certain railway ties, boom timber, and logs under a writ of execution in his hands upon a judgment recovered by the Rat Portage Lumber Co. against E. F. Kendall.

The writ was placed in the sheriff's hands on the 15th October, 1902, and the seizure was made on the 16th and 23rd June, 1903.

Claims were made on behalf of the Canadian Pacific Railway Company, of the firm of Kendall & Robinson, composed of E. F. Kendall and Thomas Robinson, and of the Bank of Ottawa, and upon interpleader proceedings instituted by the sheriff, issues were directed. The first related to the ownership of the ties, and as settled was to the effect that the Canadian Pacific Railway Company and Kendall & Robinson affirmed and the

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Rat Portage Lumber Company denied that the ties in question were at the time of the seizure the property of the claimants or of one of them as against the contestants, and if the property of Kendall and Robinson, subject to liens and assignments held by the Bank of Ottawa. The other issue related to the ownership of the boom timber and logs, and as settled was to the effect that Kendall & Robinson affirmed and the Rat Portage Lumber Company denied that the boom timber and logs in question were at the time of the seizure the property of the claimants subject to the liens and assignments of the Bank of Ottawa as against the contestants.

The interpleader order gave the claimants possession of the property seized upon payment by the claimants to the sheriff of \$1,500, to stand as security in lieu thereof.

The money was paid to the sheriff, and the property was restored to the claimants. The order directed the sheriff to pay the money, less his costs and expenses, into Court to abide further order.

The Chief Justice found the issues in favour of the respective claimants, and the execution creditors (defendants) appealed.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 30th November and 1st December, 1904.

N. W. Rowell, K.C., for the defendants, appellants. The writ of execution bound the ties and boom timber cut, from the time it was placed in the sheriff's hands, or, if not, from time to time, as the ties and boom timber were cut, the execution attached: R.S.O. 1897 (vol. III.), ch. 388, sec. 11; Am. & Eng. Ency. of Law, 2nd ed., vol. 11, p. 673. The effect of the writ in the hands of the sheriff was to create a lien in favour of the appellants upon all the property of Kendall, including his interest in the partnership property: *Robertson v. Strickland* (1868), 28 U.C.R. 221; *Meyers v. Meyers* (1872), 19 Gr. 185; *McGivern v. McCausland* (1869), 19 C.P. 460, 471; Am. & Eng. Ency. of Law, 2nd ed., vol. 11, p. 668. If a partnership was established, the sheriff was entitled to seize the ties and boom timber in respect of the interest of Kendall, and to sell

that interest: *Neil v. Almond* (1897), 29 O.R. 63; *Harrison v. Harrison* (1892), 14 P.R. 436; *Rennie v. Quebec Bank* (1901), 1 O.L.R. 303; *Helmores v. Smith* (1887), 35 Ch. D. 436, 447; *In re Woodall* (1904), 8 O.L.R. 288. The trial Judge should, if necessary, have allowed an amendment of the issues so as to warrant a finding that the appellants were entitled to seize the partnership interest of Kendall, and an amendment should be allowed by this Court: *Bryce v. Kinnee* (1892), 14 P.R. 509. The appellants' execution being in the hands of the sheriff before the execution or delivery by Kendall or Kendall & Robinson to the Bank of Ottawa of any of the securities, under the Bank Act, the appellants' lien under the writ attached upon the ties and boom timber in priority to the lien (if any) of the bank: *Congreve v. Evetts* (1854), 10 Ex. 298; *Clifford v. Logan* (1894), 9 Man. L.R. 423; *Meyers v. Meyers*, 19 Gr. at p. 187; *McGivern v. McCausland*, 19 C.P. at p. 471; *McPherson v. McPherson* (1883), 10 P.R. 140; *Samuel v. Duke* (1838), 6 Dowl. P.R. 536; *Payne v. Drewe* (1804), 4 East 523.

W. M. Douglas, K.C., for the respondents. On the evidence, the property when seized was the property of the respondents. There was no issue as to the interest of Kendall in the partnership; and if any application to amend was made at the trial, it would not have been proper to grant it. The partnership got out the ties and timber in question, and they were the property of the partnership before the seizure, and if the property had not passed to the railway company, it remained in the partnership. The execution did not bind the property from the day on which it was placed in the sheriff's hands, for the ties and boom timber as such were not then in existence. The charge in favour of the bank was a good and valid charge, and took priority over the execution in any event. Reference to 62 Vict. (2) ch. 7, sec. 9 (O.); *Archibald v. McNerhanie* (1899), 29 S.C.R. 564; *Calcutta, etc., Steam Navigation Co. v. DeMattos* (1863), 32 L.J.Q.B. 322; *Ryan v. Clarkson* (1889), 16 A.R. 311; *Giles v. Grover* (1831), 9 Bing. 128; *Ovens v. Bull* (1876), 1 A.R. 62.

Rowell, in reply.

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March 17. The judgment of the Court was delivered by Moss, C.J.O. (after setting out the facts as above):—From the evidence it appeared that in 1902 the execution debtor E. F. Kendall was the holder of a permit issued by the Crown timber agent at Rat Portage, entitling him to cut and remove from certain lands of the Crown a quantity of railway ties between the 30th April, 1902, and the 30th April, 1903. In the month of October he entered into a contract with the Canadian Pacific Railway Company to furnish them with 30,000 ties on certain terms as to delivery and payment. To enable him to carry out the contract he applied to the Bank of Ottawa for advances which the bank agreed to make on receiving an assignment of the moneys payable under the contract and other securities.

On or about the 12th November, 1902, E. F. Kendall and Thomas Robinson entered into partnership in the business of tie manufacturers to be carried on upon the lands comprised in the permit, and to include the carrying out of the contract with the Canadian Pacific Railway Company. The agreement of partnership was at first verbal, but in December or January following it was, at the instance of the Bank of Ottawa, reduced to writing and signed by the parties, and a certificate of the partnership was duly registered.

On the 15th November the partners proceeded to the lands, and Robinson was left in control in accordance with the partnership agreement. He established the camp, cut the ties, and got them out on the ice on an arm of the Lake of the Woods. In the spring they were boomed and finally towed to Norman's Bay, where they were seized by the sheriff. The boom timber and logs were cut by the partnership for the purposes of rafting the ties and were properly taken for that purpose. The Bank of Ottawa made advances from time to time to enable the work to be carried on. The bank was aware of the partnership agreement and that the ties were being got out by Robinson under its terms.

It was conceded by Mr. Rowell that the writ of execution was not a lien or charge upon any of the timber embraced in the Crown timber permit until it had been severed from the soil. But he contended that the moment there was a severance

the timber cut vested in E. F. Kendall, and *eo instanti* the execution attached, and this notwithstanding any agreements or dealings in respect of the timber made before the severance.

While it is quite true that the nature of the property was such that it was unaffected by a writ of execution in the hands of the sheriff, it does not follow that the execution debtor could not enter into some dealings in regard to his interest. There appears to be no objection to his forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials and chattels necessary to enable the work of production to be proceeded with. It would follow upon an agreement to that effect that the product would become the property of the partnership and not that of the individual who held the permit. Such an agreement is not in its nature either void or voidable as against creditors. The interest transferred by the debtor is one not exigible under a writ of execution and is not affected by any lien or charge arising therefrom. There is nothing to affect the debtor's interest, and by no process could he be compelled to use it for the benefit of his creditors: *Baby v. Ross* (1892), 14 P.R. 440, at p. 446. And if an agreement is not entered into with a colourable purpose or with an intent to defeat or defraud creditors, as by a mere pretended partnership, but is entered into with the *bond fide* intention of forming a partnership and carrying on a business, it is not open to attack at the instance of creditors.

In the present case it is clear that there was an actual agreement for a partnership made in entire good faith, at the instance of Robinson with a view to his own interests and without knowledge of any reason preventing or interfering with Kendall's entering into partnership with him. And it is not capable of argument that the agreement did not contemplate the ties and the timber necessary to their production and transport becoming the property of the partnership. It was the very object and intention of the partnership that the product of the work for the carrying on of which the timber was essential should be the property of the partnership. And there is no reason why the product to which the partnership agreement

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related should not as soon as it came into existence vest in the partnership as its property: *Holroyd v. Marshall* (1862), 10 H.L.C. 191; *In re Clarke, Coombe v. Carter* (1887), 36 Ch. D. 348; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523.

There is no good ground for holding that the claim of the execution creditors should take effect in such a way as to deprive the partner Robinson of his rights, or prevent him from enforcing them in the name and behalf of the partnership.

The findings of the learned Chief Justice in respect of both issues are well supported by the evidence. The property in the ties was shewn to be in Kendall & Robinson and the Canadian Pacific Railway Company as purchasers from them, and the property in the boom timber and logs to be in Kendall & Robinson, and these findings resolved the issues in favour of the claimants.

The defendants claimed that in any event they were entitled to execution against the partnership interest of E. F. Kendall, and that the accounts between the Bank of Ottawa and the partnership shew that some of the money in Court belongs to Kendall, and they asked that it should be so determined or that the matter be put in some train of inquiry for ascertaining the interests of the parties. But the trial was and only could be on the issues directed; and even if an amendment had been asked for, which the record does not shew, none could have been made in a case of this kind. The defendants are, doubtless, entitled to execution of the partnership interest of their debtor, and, if the seizure had been made, with a view only to the sale of that interest, it is not likely that any adverse claim would have been made. But the claim made and maintained throughout was that the property was that of E. F. Kendall alone, and the determination of that issue was all that could be dealt with, and all that can be done here is to decide whether or not that determination was right.

A sale of Kendall's interest in the partnership would not pass the property to the purchaser, but would give him a right to an account of the partnership transactions with a view to ascertaining and realizing the interest of the execution debtor. But there are no means by which such a proceeding

can be taken in this matter. The money in Court stands as security for the ties, boom timber, and logs seized by the sheriff. It is not possible to determine in this proceeding whether Kendall is entitled to any and if so how much of it. The materials for such an inquiry are not before the Court.

The defendants' remedy if any, must be sought in some proceedings in which all questions between the partnership and the execution debtor can be properly inquired into and adjusted.

The present appeal should be dismissed.

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[STREET, J.]

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June 20.

THE HAMILTON DISTILLERY COMPANY

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THE CORPORATION OF THE CITY OF HAMILTON.

THE HAMILTON BREWERY CO.

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THE CORPORATION OF THE CITY OF HAMILTON.

Municipal Corporations—Waterworks—Breweries—Distilleries—Illegal rate.

The rate which by 24 Vict. ch. 56, the city of Hamilton is empowered to charge proprietors, occupants or others, for water supplied to them, must be an equal rate.

Attorney-General of Canada v. Corporation of Toronto (1892), 23 S.C.R. 514, followed.

Were, therefore, by a by-law passed therefor a higher rate was imposed on distillers and on brewers than on other manufacturers, such rate was held to be illegal.

THESE actions were brought to test the right of the defendants to impose upon the plaintiffs a greater rate for the water supplied to them than that at which it was supplied to other manufacturers.

The actions were tried together before STREET, J., at Hamilton on June 13, 1905.

The defendants were the owners of the waterworks system in the city of Hamilton, and had the control of the water supply of the city, and under the powers conferred on them had authority "to establish by by-law a tariff of rents or rates for water supplied, or ready to be supplied, in the said city from said waterworks, which said tariff of rents or rates shall be payable, at the times and in the manner, to be established in the said by-laws, by all proprietors, occupants or others supplied with water from the said works."

On November 24th, 1902, the defendants passed by-law No. 224, which enacted

"1. From and after the 1st day of January, 1903, all water supplied to manufacturing establishments in the city of

Hamilton that apply for water meters under this by-law, or now have meters approved by the manager of the waterworks, shall be charged at the rate of $7\frac{1}{2}$ cents per thousand gallons as shewn by meters supplied by the city corporation, the applicants for such meters to pay for them and for their introduction, and also to pay meter rent, to cover the cost of inspection and repairs, as follows:" giving a schedule of prices according to the size of the meters.

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"2. The water rates chargeable under the general by-laws in force in this city relating to water rates shall be chargeable against all manufacturing establishments, excepting such as apply to the city corporation for water meters, and shall agree to pay the water rates and meter rents provided for by this by-law."

"3. Railway premises, breweries, distilleries and premises where aerated waters are made shall not be included under the term, manufacturing establishments; used in this by-law."

Sec. 7 of the by-law provided that the water rates and rents should be payable quarterly on certain specified days, and on default in payment certain penalties were to be payable.

On 29th December, 1902, the defendants passed by-law No. 237 which enacted:

"1. From and after the 1st day of January, 1903, all water supplied to breweries, distilleries and premises where aerated waters are made, shall be charged for at the rate of twelve cents per thousand gallons, as shewn by meters supplied by the city corporation, the occupants of such premises to pay for such meters, and for their introduction, and also to pay meter rent to cover the cost of inspection and repairs at the rates specified in by-law No. 224, the water rates and meter rents imposed by this by-law to be payable in the manner and at the times mentioned in section 7 of said by-law No. 224, and to be subject to the penalties therein provided."

The defendants, under the said by-laws, claimed to be entitled to levy and collect from the plaintiffs water rates or rents for the use of water, at the rate above specified, in by-law 237, which were largely in excess of the rates or rents charged to other manufacturers.

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The plaintiffs paid the same under protest, and then brought these actions, asking to have it declared that the by-laws were illegal and invalid, so far as they authorized the defendants to levy and collect said water rates or rents; and that there was no power or authority to levy and collect the same; and for a mandamus commanding the defendants to repeal the by-laws, or the portions thereof complained of; and for an injunction restraining the defendants from levying or seeking to collect from the plaintiffs water rates or rents calculated at a higher rate than that charged to other manufacturers in the city.

Shepley, K.C., and P. D. Crerar, K.C., for the plaintiffs the Hamilton Distillery Company.

Shepley, K.C., and Gausby for the plaintiffs, the Hamilton Brewery Company.

F. Mackelcan, K.C., for the defendants.

The learned judge reserved his decision, and subsequently delivered the following judgment:

June 20. STREET, J.:—The corporation of the city of Hamilton are owners of the system of waterworks by which the inhabitants of the city are supplied with water, and they have power “to establish by by-law a tariff of rents or rates for water supplied or ready to be supplied in the said city from the said waterworks: which said tariff of rents or rates shall be payable at the time and in the manner to be established in the said by-laws by all proprietors, occupants or others supplied with water from the said works.”

The ownership of the waterworks with other necessary powers in connection therewith to which it is unnecessary to refer here was conferred upon the defendants by the Act 24 Vict. ch. 56 in which the previous Acts relating to the same subject matter are referred to. I have been unable to find in these Acts any unusual powers regarding the making of a tariff of rates affecting the questions presented by the cases now in contention.

The council of the defendants' corporation have passed two by-laws under the powers conferred upon them by the Act

above referred to which in effect provide that all manufacturers carrying on business within the city, excepting breweries, distilleries and manufacturers of aerated waters, shall pay a rate of $7\frac{1}{2}$ cents per 1,000 gallons for the water taken by them as shewn by their meters; and that breweries and distilleries and manufacturers of aerated waters shall pay a rate of 12 cents per 1,000 gallons.

The plaintiffs in these actions are companies coming under the higher rate and the present actions are brought to try the right of the defendants to impose upon them a greater rate for the water supplied to them than that at which it is supplied to other manufacturers.

The Supreme Court in the year 1893 in the case of *Attorney-General of Canada v. Corporation of the City of Toronto* (1893), 23 S.C.R. 514, laid down the principles which in their opinion should govern the exercise of a similar power, and held that the rate or rent charged to customers of water for the water supplied to and consumed by them must be an equal rate charged to all consumers just as upon the like principle the rate imposed upon assessable property must be an equal rate imposed upon all property liable to taxation. The principles so laid down are binding upon me and I am of opinion that they govern the present case.

There should be a declaration that the by-laws so far as they impose upon distilleries, breweries, etc., a higher rate than that charged against other manufacturers for water supplied are beyond the powers of the council, and an injunction restraining the defendants from collecting from the plaintiffs the increased rate under the by-laws in question; and the defendants must pay the costs.

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[TEETZEL, J.]

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BRAUCH V. ROTH.

July 17.

Master and Servant—Breach of Contract—Breach Induced by Third Person—Trade Union.

It is an actionable wrong to persuade a servant to break his contract with his master, and it is no excuse that the persuader is not actuated by ill-will to the master but acts in good faith in pursuance of the provisions of the constitution of a trade-union of which he and the servant are members.

The principles of *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239, and *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732, applied.

ACTION tried at Berlin on the 2nd of December, 1903, before TEETZEL, J., in whose judgment the facts are stated.

E. E. A. Du Vernet, and *J. A. Scellen*, for the plaintiff.

A. B. Aylesworth, K.C., and *M. A. Secord*, for the defendant.

July 17. TEETZEL, J.:—At the close of the argument I was asked to reserve my judgment until the case of *South Wales Miners' Federation v. Glamorgan Coal Company*, then in appeal, should be decided, and judgment has only recently been delivered in the House of Lords: [1905] A.C. 239.

The plaintiff is a contractor and sues for an injunction and damages, charging the defendant with having wrongfully and maliciously come upon the premises of one Levi Hagey, where the plaintiff's men were at work, and by means of threats and persuasions succeeded in procuring the plaintiff's workmen to break their agreements with the plaintiff and cease to work for the plaintiff.

The defendant and the plaintiff's three employees were members of the bricklayers and masons' union.

The plaintiff had a contract for the erection of the brickwork on a house for one Hagey, the stonework of the foundation for which had been previously built for Hagey by one Affeldt, who was not a member of any union.

By a clause in the constitution and by-laws of the union to which the defendant and the men belonged it is provided that "no bricks shall be laid on walls built by non-union men;" and

also, that "no member of this union shall be allowed to work on any brick or mason work done by scab or non-union men unless settled satisfactorily to this union."

It does not appear by the evidence that the plaintiff was, or that any of the bricklayers employed by him were, aware of the fact that the stone foundation had been constructed by non-union workmen until some time after the work had been begun, and not until the information was communicated by the defendant.

There is also a provision in the said constitution and by-laws that in case of trouble between the order and a contractor, any member when notified to quit working for the said contractor and refusing to do so shall be fined such an amount as the order may see proper.

The evidence as to the defendant's interference is that on the day he visited the premises he met on the way up one of the plaintiff's men, George Brauch, and, in answer to an inquiry, the defendant said he was going up to stop the men working on the job, as non-union men did the stonework. George Brauch further testified that defendant said it was a "a non-union job and you cannot work on it." Upon arrival, the defendant went upon the scaffold where another of the plaintiff's workmen, Peter Sauve, was engaged in laying brick, and the defendant told Sauve he must stop or he would be fined, and he stopped accordingly and did not return; and the other man, George Brauch, also quit work for two weeks.

On the same evening a meeting of the union was held at which the defendant and George Brauch were present, and the latter swears that he proposed at the meeting that a permit should be given to the men to finish the work, but all the others present, including the defendant, were against this proposition. He states that the defendant at the meeting put in a claim to be paid for the time he had lost in going up "to order us off." He also said that the defendant voted against a resolution allowing the men to go back.

As to the third man in plaintiff's employ, I think upon the evidence he had already decided to quit before being notified by the defendant.

The defendant in his evidence denies that he had any ill-will or feeling towards the plaintiff, and says that his only object was

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to notify the men of what the president of the union had told him. He says that he told the men that the job was a non-union one, but denies that he said anything about a fine, and claims only to have told the men that it was a non-union job.

I am of the opinion upon the evidence that the defendant went to the premises to order the plaintiff's men off the job, and that he did tell them that the foundation was put up by non-union men, and that they would have to quit or they would be fined, and that in consequence of the defendant's statement they did quit.

The effect of what the defendant did and said was to cause the plaintiff's workmen to break their agreement with him, from which he suffered some damages, and I think upon the authorities that the defendant is liable to the plaintiff in this action.

Procuring a breach of contract is an actionable wrong unless there is justification for such procurement.

Mr. Aylesworth, for the defendant, contended that to entitle the plaintiff to succeed he must establish that the defendant acted maliciously, as charged in the statement of claim.

I think the *Glamorgan* case, and the other cases cited in the judgment, are decisive against this contention.

In the *Glamorgan* case, miners employed in collieries, without giving notice to their employers and in breach of their contracts, abstained from working on certain days upon the direction or order of a federation of miners, given by their executive council. The federation and council acted honestly and without malice or ill-will towards the employers, and with the object only of keeping up the price of coal by which the wages were regulated, and it was held that an action for damages lay by the employers against the federation and its officers, no justification for their action being shewn.

At page 245, Lord Macnaghten says: "It is not disputed that the federation committed an actionable wrong. It is no defence to say that there was no malice or ill-will against the masters on the part of the federation or on the part of the workmen at any of the collieries thrown out of work by the action of the federation. It is settled now that malice in the sense of spite or ill-will is not the gist of such an action as that which the plaintiff's have instituted." And at page 250, Lord James says:

"As to the word 'wrongfully' I think no difficulty arises. If the breach of the contract of service by the workmen was an unlawful act, any one who induces and procures the workmen, without just cause or excuse, to break such contract also acts unlawfully, and thus the allegation that the act done was wrongfully done is established.

But the word 'maliciously' has also to be dealt with. The judgment of Bigham, J., proceeds on the ground that 'to support an action for procuring a breach of contract it is essential to prove actual malice.'

I cannot concur in this view of the law. The word 'maliciously' is often employed in criminal and civil pleadings without proof of actual malice apart from the commission of the act complained of being required. If A utters a slander of B, even if he be a stranger to him, the averment that A maliciously spoke such words of B is established by simply proving the uttering of words taken to be false until the contrary be proved. In such an action the word 'maliciously' may be treated either as an unnecessary averment or as being proved by inference drawn from the proof of the act being wrongfully committed. I think also that the learned Judge's judgment is not supported by the authorities to which he refers.

In *Bowen v. Hall* (1881), 6 Q.B.D. 333, Brett, L.J., with the sanction of Lord Selborne, thus expressed his view: 'Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie.'

In the *Mogul* case [*Mogul S.S. Co. v. McGregor* (1889), 23 Q.B.D. 598] Bowen, L.J., also said: 'Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse.'

And in *Quinn v. Leatham*, [1901] A.C. 510, Lord Macnaghten thus defined the law on the subject: 'A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference.'

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It will be observed that none of these three very learned Judges employ the word 'maliciously' as being necessary in order to constitute a right of action."

In my opinion, also, the provisions in the by-laws of the union above cited form no excuse to the defendant in procuring, as I find he did procure, a breach of the agreements for service by the plaintiff's men. The plaintiff was not aware of or a party to these provisions, and his rights against his men or the defendant cannot be affected thereby.

In *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732, the plaintiff, who was a workman, entered into a contract by which he was apprenticed to his employers to learn certain work. A friendly society of workmen engaged in similar work protested to the employers against the engagement of the plaintiff as an apprentice, upon the ground that it was against one of the rules of the society which the employers had agreed to and signed, and they gave notice that if the engagement was continued they would call out the workmen who were working for the employers and who were all members of the society.

In consequence of this threat, the employers refused to continue to teach the plaintiff under the terms of the deed of apprenticeship, and it was held that the plaintiff had a good cause of action to which the previous agreement between the society (defendants) and the employers was no answer. At page 737, the Master of the Rolls says: "Persuasion by an individual for the purpose of depriving another person of the benefit of a contract, if it is effectual in bringing about a breach of the contract to the damage of that person, gives a cause of action," citing *Lumley v. Gye* (1853), 2 E. & B. 216, "and a strong belief on the part of the persuader that he is acting in his own interests does not seem to me to improve his position in any respect."

The plaintiff in this case is, in my opinion, entitled to have the interlocutory injunction made perpetual, and I assess the damages which the plaintiff has sustained at the sum of \$50, and direct judgment to be entered accordingly, with costs.

R. S. C.

[DIVISIONAL COURT.]

IMPERIAL TRUSTS CO. v. NEW YORK SECURITY AND TRUST CO.

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Feb. 2.

Mortgage—Interest on Interest post Diem—Construction of Proviso.

A mortgage contained the following proviso: "Provided this mortgage to be void on payment of five thousand dollars . . . with interest from the date hereof at the rate of eight per cent. per annum as follows: The said principal sum at the expiration of one year from the date hereof . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every twelfth day of November, February, May, and August hereafter. . . . In the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same:—"

Held, MAGEE, J., dissenting, that the proviso, taken as a whole, did not entitle the mortgagees to interest upon interest accruing after maturity of the principal money.

Per MAGEE, J., that the proviso made the simple interest payable quarterly after default in payment of principal, and entitled the mortgagees to compound interest thereon, but not with quarterly rests.

APPEAL by the defendants (subsequent mortgagees) from an order of Idington, J., in the Weekly Court, dismissing the defendants' appeal from a report of the Master in Ordinary in a mortgage action, upon the ground that the finding of the Master that the plaintiffs were entitled to compound interest on the mortgage money after maturity was erroneous.

The appeal was heard by a Divisional Court composed of BOYD, C., TEETZEL and MAGEE, JJ., on the 18th November, 1904.

W. H. Irving, for the appellants. The account of interest should not have been taken with rests, and interest on interest should not have been allowed after maturity: *Powell v. Peck* (1886), 12 O.R. 492; *Middleton v. Scott* (1902), 4 O.L.R. 459, at p. 464; *Manitoba and North-West Loan Co. v. Barker* (1892), 8 Man. L.R. 296; *Wilson v. Campbell* (1879), 8 P.R. 154.

H. C. Fowler, for the plaintiffs. The proviso in the mortgage is sufficient to authorize the allowance of interest on interest. See *St. John v. Rykert* (1884), 10 S.C.R. 278. If the

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construction is doubtful, the doubt should be resolved in favour of the mortgagee: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 16, p. 1001.

Irving, in reply.

February 2. BOYD, C.:—The contract expressed in this instrument is, that the mortgage shall be void on payment of \$5,000 with interest at 8 per cent. per annum as follows: The principal sum at the expiration of one year from the date: And the interest at the rate aforesaid on the principal money . . . quarterly on each 12th day of November, February, May, and August thereafter. All the other stipulations in the proviso are supplementary or parenthetical, and from the fact that a printed form has been used they are not happily fitted to the circumstances of this security.

One provision as to interest provides for payment at the said rate till the whole principal money is satisfied as well after as before maturity thereof. This will carry 8 per cent. on the principal till it is paid, and that is all that is decided by *Middleton v. Scott*, 4 O.L.R. 459, 464.

The next provision is that in the event of interest not being punctually paid, the amount of the same shall bear interest at the said rate from the date of its maturity (*i.e.*, the maturity of each gale of interest) until paid in like manner as if it were part of the principal. That provides for interest upon interest (compounding interest) during the currency of the mortgage only and while gales of interest fall due thereunder periodically, but not to a limit of time when the mortgage has been forfeited by non-payment of the principal, for then the whole is due *de die in diem*, and there are no future periods of maturity for the interest—all is overdue.

It is explicitly stated in the last clause of the proviso that the provision for compounding interest shall not entitle the mortgagor to any extension of time for the payment of the interest on the principal beyond the date thereinbefore provided for payment of the same, that is, within one year from the date. So the whole scope of the provision as to compounding interest is within the duration of the mortgage as such, but a more outreaching stipulation is made as to the simple interest

on the principal money, which is to run at 8 per cent. till the principal is paid.

To read the mortgage as if providing for periodical payments of interest *quarterly* after the expiration of the first year and the non-payment of the principal at that appointed time, would be repugnant to the notion of a mortgage which became absolute and enforceable forthwith upon default in payment of the principal at the time appointed.

There was no default in paying interest during the currency of the security as a mortgage, and there is no clear provision for compounding interest thereafter.

I agree with the judgment of my brother Teetzel that the appeal should succeed with costs to the appellants—which may be deducted from the security if the parties wish.

TEETZEL, J.:—Appeal from the judgment of Mr. Justice Idington confirming report of Master in Ordinary in a foreclosure action. The mortgage in question contains the following proviso:—"Provided this mortgage to be void on payment of five thousand dollars in gold coin or its equivalent in lawful money of Canada, with interest from the date hereof at the rate of eight per cent. per annum as follows:—The said principal sum at the expiration of one year from the date hereof, . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every twelfth day of November, February, May, and August hereafter, the first of such payments of interest to be due and made on the twelfth day of November next, and taxes and performance of statute labour. It being agreed and understood that in the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same." Then follows the statutory covenant, "that the mortgagor will pay the mortgage money and observe the above proviso."

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In computing interest after maturity of the principal money the Master allowed the plaintiffs compound interest at eight per cent. per annum, making the rests quarterly. Upon the argument Mr. Irving, for the appellants, while conceding that the above proviso entitled the plaintiffs to interest at eight per cent. per annum on all principal money as well after as before maturity, contended that the plaintiffs were not even entitled to simple interest upon the quarterly gales of interest upon the principal money *after maturity of the latter*, much less compound interest. The words "as well after as before maturity thereof" in the first sentence of the proviso have, I think, only the effect of extending the rate of interest to principal unpaid both before and after the year, and are not intended to and do not qualify the mode of payment. I think the word "payable" must by necessary implication be read into the proviso immediately before the word "quarterly" and be qualified by that word. Under this proviso the mortgagor would clearly have no right, after default in paying principal, to insist that his interest was only payable quarterly, nor could the mortgagee refuse to accept payment of all principal and accrued interest and discharge the mortgage at any time before a quarterly gale day. After the year the accrued interest is due and payable at any time the mortgagee may choose to sue for it, so that the word "quarterly" has no force when applied to any payments of interest except during the specific term of the mortgage.

In the second sentence of the proviso no express provision is made for payment of interest on interest that may accrue *after maturity of the principal* or on default in paying same, and, in the absence of express words, I do not think we ought to presume that the parties intended to make provision for a breach of the covenant. The words "said interest not being punctually paid" can only refer to the interest in respect of which dates of payments are previously fixed, and the only dates so fixed are the four dates before and at maturity of the principal. The word "punctually" etymologically construed means "on the point," i.e., I think, in this case, at the exact time fixed for payment in the previous sentence.

Then the words "date of its maturity" can only have reference to the previously fixed dates of maturity of interest

and not to the daily maturity which would occur after the expiration of the year. The last phrase of the proviso can also have reference only to the same dates of maturity. It does not seem to me, therefore, that the proviso taken as a whole entitles the plaintiffs to any interest upon interest which accrues after maturity of the principal money. I think it is clearly deducible from the authorities that where a claim is made to *convert interest into capital* the intention of the parties should be indicated by clear and unambiguous language; and, in my opinion, no such intention is indicated in this case, except as to interest accruing during one year.

See *St. John v. Rykert*, 10 S.C.R. 278, at p. 288; Bythewood, 4th ed., vol. 3, p. 895, and precedents, p. 1131; Am. & Eng. Encyc. of Law, 2nd ed., vol. 16, p. 1073; Coote on Mortgages, 7th ed., p. 1181.

I would allow the appeal with costs, and direct the report to be amended by striking out all allowances for interest *on interest*, which has accrued since maturity of principal.

MAGEE, J.:—It was competent for the parties to agree that the interest should be calculated as has been done by the Master, that is, compounded with quarterly rests, after the time for payment of principal as well as before.

Clauses to that end are in frequent use in mortgages, and forms are given in books of precedents. When, however, mortgagees wish to secure interest on that basis, it should be made clear.

In this case the stipulation for interest after default is somewhat out of place in the proviso for making void the grant, the essence of which is payment without default, but the situation does not seem to affect the meaning, though requiring the construction presented by the mortgagees to be more clearly made out.

It has to be considered with an endeavour to arrive fairly and reasonably at the meaning which the parties must be taken to have attributed to it. The mortgage is expressed to be made in pursuance of the Act respecting Short Forms of Mortgages. The proviso reads thus: "Provided this mortgage to be void on payment of five thousand dollars . . . with interest from

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the date hereof at the rate of eight per cent. per annum as follows: The said principal at the expiration of one year from the date hereof . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied and as well after as before maturity thereof quarterly on each and every twelfth day of November, February, May, and August hereafter . . . "

Does this word "quarterly," with the succeeding words, apply after the principal became payable. The appellants say it does not. The plaintiffs say it does. As there was nothing to prevent these mortgagees from stipulating that interest should be compounded with quarterly rests, so there was nothing to prevent them making interest payable quarterly after the time for payment of principal, even though it might be subject to a right of the mortgagor or mortgagee to make or require payment in full at any date. The only question is, was that done?

The clause as to the interest is all printed except the words "quarterly," "twelfth," "November," "February," "May," and "August." Being so, it would be intended also for cases where the principal would be payable in several years after date and interest payable yearly or otherwise. In such cases the words "each and every" would have no significance, and I do not attribute any to them in this instance, though it might be argued that there would only be one twelfth day of November before this principal came due. But it does not appear to me that the phrase "as well after as before maturity" can fairly be dissociated from the word "quarterly" with its succeeding words.

They are both in effect limitations of the word "interest." To that word there are four specific matters of qualification. 1st. At what rate? "The rate aforesaid." 2nd. On what amount? "On the principal money from time to time remaining unpaid." 3rd. For how long? "Until the whole of the same is satisfied and as well after as before maturity." And 4th. How payable? "Quarterly on each and every twelfth day of November, February, May, and August hereafter." I do not see that any one of these can be dealt with apart from the others. In ordinary construction it seems to me each of

them applies directly and solely to the word "interest," as that word is expounded by all the others together.

The construction asked by the appellants would require that the third phrase, instead of being attributed to the chief word "interest," should be assigned to the secondary word "rate," and would divide the third phrase for the purpose of the fourth but not for that of the second or third.

More strictly, perhaps, the word "quarterly," with its succeeding words, is to be attributed to the words "on payment," or, as the Act respecting Short Forms of Mortgages interprets them, "if the said mortgagor . . . do and shall well and truly pay . . . on the days and times and in manner following."

If the sentence then were read—"shall pay quarterly on each and every 12th day of November, February, May, and August hereafter, the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of the same is satisfied and as well after as before maturity thereof," it seems to me to make it reasonably clear that that which is to be paid quarterly is the interest which follows, and the duration of which is provided for.

More strictly still possibly not only the mode but the duration of the payments is to be attributed to the word "pay," and if so the sentence should be read thus: "Shall pay quarterly, etc., until the whole of the principal money is satisfied, and as well after as before maturity, the interest at the rate aforesaid on the principal money from time to time remaining unpaid." If put in that way, the sense seems by no means more favourable to the appellants.

It may be noted as further evidencing, if need were, the intention of the parties to provide for subsequent interest, that it is to be "on the principal money from time to time remaining unpaid," whereas the principal is all payable in one sum.

It is true that in the case of *People's Loan and Deposit Co. v. Grant* (1890), 18 S.C.R. 262, where the mortgage made the principal payable at a specified date with interest thereon at 10 per cent. per annum until such principal money and interest shall be fully paid and satisfied, it was held that that rate was

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only payable till the date for payment of principal, and thereafter only the statutory rate of 6 per cent. was recoverable. And similar ruling was made in *St. John v. Rykert*, 10 S.C.R. 278, and in other cases. These decisions, however, were upon the ground that the parties were not contemplating anything but payment at the time appointed, and it could not be presumed that they were making any bargain as to what would occur thereafter.

Here there is not room for that principle. The parties are clearly contemplating default and providing for it.

The use of the word "and" in the phrase "and as well after as before maturity" seems to emphasize the meaning.

I think, therefore, that the mortgage provides for payment of simple interest quarterly after default in payment of principal, or, as it says, "after maturity."

The next question is the compound interest. As to that the wording is: "In event of the said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal." Here "the said interest" can only mean that which has been spoken of, namely, interest as well after as before maturity. As that is made payable on specified quarterly dates, this clause, in my view, gives interest on each of those quarterly amounts. Then how is that interest to be computed? Unless otherwise provided, it would be only simple interest on each quarterly instalment.

The only provision is that it "shall bear interest at the said rate . . . in like manner as if it were part of the principal."

Bearing interest is one thing, the time for payment of that interest is another. There is nothing in these words to make this interest payable quarterly or to entitle the mortgagee to interest upon it, and in that respect the computation in the report should be corrected. The other words in the mortgage do not, I think, affect the questions involved. The amount due to the plaintiffs should be calculated on this basis:—Take the principal and add simple interest quarterly on the specified dates, after as well as before the time for payment of the principal, and add simple interest on each of these quarterly

instalments of interest. Then as against these appellants, who are subsequent mortgagees, the interest accrued down to the date 6 years before the action must be struck off, as the Master has done.

The matter should be referred back to the Master, and the appellants should have the costs of the appeal.

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[IN THE COURT OF APPEAL.]

REX V. PIERCE ET AL.

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March 17.

Court of Appeal—Right of Appeal to—Order of Divisional Court on Appeal from Conviction—Loan Corporations Act—Judicature Act—Amending Act, 4 Edw. VII. ch. 11.

There is no right of appeal to the Court of Appeal from a judgment or order of a Divisional Court made upon an appeal to that Court under sec. 117 (4) of the Loan Corporations Act, R.S.O. 1897, ch. 205, from a magistrate's conviction.

Construction of secs. 50 and 75 of the Judicature Act, as enacted by sec. 2 of the amending Act 4 Edw. VII. ch. 11.

Leave to appeal from the decision in 9 O.L.R. 374 refused, OSLER, J.A., dissenting.

AN application by the defendants for leave to appeal to the Court of Appeal from an order of a Divisional Court, 9 O.L.R. 374, affirming a conviction of the defendants by the police magistrate for the city of Toronto, upon an appeal to that Court under the provisions of sec. 117 (4) of the Loan Corporations Act, R.S.O. 1897, ch. 205.

The application was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 22nd February, 1905.

E. F. B. Johnston, K.C., and *J. M. Godfrey*, for the defendants.

J. R. Cartwright, K.C., and *J. W. Curry*, K.C., for the Crown and private prosecutor.

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March 17. Moss, C.J.O.:—The defendants contend that an appeal now lies to this Court by virtue of the Act 4 Edw. VII. ch. 11, amending the Judicature Act. If that Act has conferred a right of appeal, which formerly did not exist in cases of this kind, it must be by reason of the provisions of secs. 50 and 75 of the Judicature Act, as enacted by sec. 2 of the amending Act.

Section 50 (1) deals with the jurisdiction of the Court of Appeal to hear and determine appeals from a Divisional Court. It provides that "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment, order, or decision save as in this Act mentioned of a Divisional Court or High Court subject to the provisions of this Act and to such rules and orders of the Court for regulating the terms and conditions on which appeals shall be allowed as are now in force or may be made pursuant to this Act." Section 75 provides that "the judgment, order, or decision of a Divisional Court shall be final, and there shall be no further appeal therefrom save only at the instance of the Crown in a case in which the Crown is concerned and save as provided in sections 50 and 76."

The effect of these two provisions is that there is to be no further appeal by a subject from any judgment, order, or decision of a Divisional Court unless the right to such appeal is to be found either in sec. 50 or in sec. 76. The jurisdiction conferred by sec. 50 (1) is to hear and determine appeals from Divisional Court judgments, orders, or decisions "save as in this Act mentioned," that is, the Court is to have jurisdiction except in respect of any judgments, orders, or decisions that may be mentioned. If any are mentioned or excepted, then there is no jurisdiction in respect of them. Otherwise there is jurisdiction, but the exercise of the jurisdiction is subject to the provisions of the Act. Then comes the declaration in sec. 75 that there shall be no further appeal from the judgment, order, or decision of a Divisional Court save at the instance of the Crown and as provided by secs. 50 and 76.

Turning then to sec. 50 (1), we do not find that it provides or gives a right of appeal in any case. It does not point to any case in which the judgment, order, or decision of the Divisional Court is not final and in which there may be a further appeal.

Full effect is given to its provisions by holding that it confers jurisdiction to hear and determine appeals where the right of appeal exists under the Act. Sub-section (2) is but a continuation of the jurisdiction already vested in the Court by the various statutes there specified. But it supplies instances to which the language of sec. 75 "save as provided in sections 50 and 76" is applicable. In some of the cases mentioned the appeal is or may be from a Divisional Court, *e.g.*, under R.S.O. ch. 83, R.S.O. ch. 91, R.S.O. ch. 153, and R.S.O. ch. 245. Nevertheless, no new jurisdiction is conferred and no new right of appeal is given. Looking at the whole section, nothing is to be found creating or conferring, either expressly or by inference, a right of appeal in any case in which there was not such a right before the enactment. It is not disputed that before the enactments in question no appeal lay to the Court of Appeal in a case like the present. And—if its provisions are applicable at all—sec. 75 distinctly shuts out an appeal on the part of the defendants, nothing to save it being found either in sec. 50 or in sec. 76.

The application should be refused.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I think this case raises a question of considerable importance on the point of jurisdiction, and also on that of the proper construction of the applied section of the Loan Corporations Act. If leave be necessary, I think it should be granted for the purpose of discussing both.

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[STREET, J.]

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CUMMINGS V. THE CORPORATION OF THE TOWN OF DUNDAS.

June 26.

Municipal Corporations—Non-repair of Highways—Street Carried Away by Natural Stream—Liability.

Without any fault on the defendants' part a rapid natural stream running through their town changed its course, and in so doing carried away part of the street upon which certain of the plaintiff's lands were situate:—

Held, that the defendants were not bound to replace it under their statutory duty to repair highways; nor were they liable for any depreciation in the value of the plaintiff's property.

THIS was an action tried before STREET, J., at the Hamilton non-jury sittings, on June 12th and 13th, 1905; and was brought to recover damages for non-repair of a highway under the circumstances set out in the judgment.

M. J. O'Reilly, for the plaintiffs, referred to *Caledonian R.W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259.

John W. Nesbitt, K.C., and *H. C. Gwyn*, for the defendants, referred to *Attorney-General v. Toronto R.W. Co.* (1868), 14 Gr. 673; *Baird v. Wilson* (1872), 22 C.P. 491.

June 26. STREET, J.:—The action is brought by Maurice Cummings, who owns lots 5, 6, and 7, south side of Quay street, to recover damages from the corporation of the town of Dundas for injury done to his property by the non-repair of Quay street opposite his land.

There are two houses upon his land to which the only practicable means of access is from Quay street. That street, until about twelve years ago, was some forty feet wide; the street and the lots are both low, and were never very far above the level of the Dundas creek, which bounded the street opposite the plaintiff's land, and are now in places below it. The creek runs from the high lands surrounding the town of Dundas, and has a very rapid and impetuous current, especially in high water, to a short distance above the plaintiff's land, where the ground becomes level and the current slow. About twelve years ago a dam, called the Cotton-Mill Dam, some distance above the plaintiff's land, was carried away by a

freshet, and later another dam, called Ewart's Dam, higher still up the creek, was also carried away. These dams had been built by private individuals or corporations, and were owned by them at the time they were carried away. A large quantity of stone, rubbish and débris was carried down the stream when these dams gave way and lodged in the bed of the creek, in the flats opposite and above the plaintiff's land. The stream then spread itself into other channels which it cut out for itself, and one of these channels was formed partly out of the roadway of Quay street, with the result that the portion of that street in front of the plaintiff's land for a distance of some fourteen or fifteen feet in length has been reduced to eight or nine feet in width. The plaintiff's access to his lots is rendered difficult, and their value has been reduced in consequence. The defendants a few years ago raised \$5,000 by by-law to clear out the bed of the stream and spent a large sum in doing so, but the whole work was undone and the bed of the stream was filled up again by a freshet in the following year. The defendants, after the Ewart Dam was carried away as above mentioned, purchased and rebuilt it. They have had trouble in keeping it in repair, but no part of the matters of which the plaintiff complains is chargeable to anything which has happened to this dam since the defendants have owned it.

The position then is this: without any fault of the defendants a rapid, natural stream, running through the town, has changed its course, carrying away a part of the street upon which the plaintiff's lots are situate, and the question is whether the defendants are bound to replace it under their statutory duty to repair highways. In my opinion they are not bound to do so under the circumstances. The destruction of the road bed is so complete that there is nothing left of it to be repaired. What is required is the building of an entirely new road bed, not the repair of an existing one. The construction of a new road bed would be impossible until the stream is first diverted from its course over what was a part of the street and restored to the course in which it ran twelve years ago. No evidence was given to shew that this could be done by any reasonable expenditure, and the town has already spent a large sum in an unsuccessful effort to restore the stream to its

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original bed: see *Attorney-General v. Weston Plank Road Co.* (1853), 4 Gr. 11; *Attorney-General v. Toronto R.W. Co.*, 14 Gr. 673. If I am right in this conclusion then it also follows, I think, that they are not liable for any depreciation in the value of the plaintiff's property which has resulted from the destruction by the stream of the road in front of it.

A claim for damages is made owing to the delay in repairing the bridge on Church street, by means of which the access of the plaintiff and of several other persons to their property was impeded. The bridge was rendered unsafe for all but light vehicles in March, 1904, by a quantity of ice brought against it by a freshet in the creek, and the present action was begun on May 18th, 1904. The bridge was repaired during the early autumn of 1904.

The plaintiff has not shewn that any actual loss or damage accrued to him by reason of the condition of the bridge: the whole damage of which he complains seems to have arisen, according to his evidence, from the destruction of the street in front of his lot by the stream and the water which he complains came down upon him from the axe factory. I dealt with the latter matter at the trial, and I have now dealt with the whole of the claims made by the plaintiff, and have pointed out the causes of the damage he has sustained. The lots are low lots, subject to be flooded by water from the hills behind them as well as by that from the blocking up of the channel of the stream in front of them, and I am unable to find that the defendants are liable to the plaintiff for what has happened.

I think the action must be dismissed with costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

REX V. MANNIX.

C. A.

1905

June 29.

Criminal Law—"Common Bawdy House"—Woman Living Alone—*Criminal Code, sec. 195.*

Section 195 of the Criminal Code, 55-56 Vict. ch. 29 (D.), has not changed the law as to what constitutes the offence of keeping a common bawdy-house; and a woman living by herself in a house is not within its scope, unless other women than herself resort to the house for purposes of prostitution.

THIS was a case reserved by the police magistrate at Hamilton under the circumstances mentioned in the judgment. The appeal was argued on May 3rd, 1905, before MOSS, C.J.O., and MACLENNAN, OSLER, GARROW, and MACLAREN, JJ.A.

M. J. O'Reilly, for the defendant, contended that the term "bawdy-house" used in secs. 195* and 198 of the Criminal Code, 55-56 Vict. ch. 29, (D.), meant a house kept for purposes of prostitution, a "house of ill-fame," and referred to the dictionaries of Stroud, Bouvier, Black, Anderson and Abbott, *sub voc.*; and to *Singleton v. Ellison*, [1895] 1 Q.B. 607; Stephen's Dig. of Criminal Law, 6th ed., p. 144; *Rex v. Young* (1902), 6 Can. C. C. 42; *Rex v. Osberg* (1905), 9 *ib.* 180; *People v. Buchanan* (1878), 1 Idaho 681, 689; *State v. Evans* (1845), 27 N.C. 603, 607; *Reg. v. McKenzie* (1885), 2 M.R. 168; Am. & Eng. Ency. of Law, 2nd ed. vol. 9, pp. 518-20.

J. R. Cartwright, K.C., for the Crown, contended that the code evidently intended to go beyond the common law definition of "bawdy-house;" that a house is kept for purposes of prostitution even though only the proprietress prostitutes herself; and that if it is a "bawdy-house" where there are several women and only one man, it should be held to be so also, when there are several men and only one woman.

O'Reilly, in reply.

June 29. The judgment of the Court was delivered by OSLER, J.A.:—I am of opinion that the conviction should be

*Sec. 195. A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

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quashed. I do not think that the 195th section of the Criminal Code has made any change in the law as to what constitutes or is necessary to prove the offence of keeping a common bawdy-house. Such a house is defined as "a house, room, set of rooms, or place of any kind kept for purposes of prostitution," which is almost in terms, and is in substance the language used by Mr. Justice Stephen in his Digest of the Criminal Law, 5th ed. p. 142, in defining the common law offence, viz., "a house, or room, or set of rooms, in any house kept for purposes of prostitution." I agree with the judgment of Killam, C.J. (Manitoba), in *Rex v. Young*, 6 Can. Cr. Cas. 42, that a woman living by herself in a house cannot be convicted of keeping it as a common bawdy-house unless other women than herself resort to it for the purpose of acts of prostitution. This was decided in *Singleton v. Ellison*, [1895] 1 Q.B. 607, a case arising on sec. 13, sub-sec. (1) of the Criminal Law Amendment Act, 1885, 48-49 Vict. c. 69, (Imperial), which enacts that "any person who keeps or manages or acts or assists in the management of a brothel . . . shall on summary conviction," etc. The definition of Stephen, J., was acted and relied on by the prosecution. The magistrates refused to convict and on appeal it was held that they were right. Wills, J., said, at p. 608: "A brothel is the same thing as a 'bawdy-house,' a term which has a well-known meaning as used by lawyers and in Acts of Parliament. In its legal acceptation it applies to a place resorted to by persons of both sexes for the purpose of prostitution. It certainly is not applicable to the state of things described by the magistrates in this case where one woman receives a number of men."

In *Rex v. Osberg* (1905), 9 Can. Cr. Cas., 180, at pp. 182-3, Richards, J. (Manitoba), construed sec. 195 as intended "merely to define the nature of the premises under which a bawdy-house may be kept and not as stating what acts constitute such keeping. Apparently it merely enacted in statutory form what had already been decided to be the law as to the nature of the premises."

The code has in my opinion simply adopted the definition of the common law offence, and we ought not by construction to create a new offence unless we can clearly see that this is the obvious and necessary meaning of the Act.

I think the magistrate should have followed the cases cited in dealing with the evidence before him, and as he has not done so the conviction must be quashed.

See also Am. & Eng. Ency. of Law, 2nd ed., vol. 9, p. 518 *et seq.*, 14 "C.Y.C." (Cyclopædia of Law and Procedure) 484, sub tit. "Disorderly houses."

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[IN CHAMBERS.]

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April 18.

ARMOUR V. TOWN OF PETERBOROUGH.

Jury Notice—Action against Municipal Corporation—Non-repair of Highway—Judicature Act, sec. 104.

In an action for damages for injuries sustained by the plaintiff from a fall upon a highway under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper, and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions:"—

Held, that the action was for "injuries sustained through non-repair" of the highway, within the meaning of sec. 104 of the Judicature Act, R.S.O. 1897, ch. 51, and that a jury notice was therefore irregular.

MOTION by the defendants to strike out a jury notice filed by the plaintiff, upon the ground that the action came within sec. 104 of the Judicature Act, R.S.O. 1897, ch. 51, providing that "all actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks, shall be tried by a Judge without a jury," etc. The action was to recover damages for personal injuries sustained by the plaintiff by a fall upon a highway under the control of the defendants.

The motion was heard by the Master in Chambers on the 17th April, 1905.

Grayson Smith, for the defendants.

C. W. Kerr, for the plaintiff.

April 18. THE MASTER IN CHAMBERS:—The 6th and 7th paragraphs of the statement of claim allege that "the accident to the plaintiff was caused by the negligent construction of the said pavement, which is built on an incline, and is made with an exceedingly smooth granite finish, at all times dangerous to pedestrians, and the said pavement when moist is rendered even more dangerous than when dry, through the faulty, improper,

and negligent construction thereof. This pavement has been well-known and notorious at the place in question by reason of the negligent, improper, and faulty construction thereof, and the exceeding smoothness of the surface thereof, and by reason of the fact that the said pavement is built upon an incline, which would call for the ordinary rough finish which it is customary and prudent and usual to build under said conditions."

The question is, does not this allege nonfeasance so that the action is for an injury "sustained through non-repair?"

This was considered in the cases of *Clemens v. Town of Berlin* (1904), 7 O.L.R. 33, and *Kirk v. City of Toronto* (1903), 7 O.L.R. 36, where all the cases are cited.

The present action is based on the alleged "negligent, improper, and defective construction" of the sidewalk itself.

As pointed out by Street, J., in *Barber v. Toronto R. W. Co.* (1896), 17 P.R. 293, "the cases upon non-repair and obstruction have run into one another a good deal."

It may not at first sight be easy to reconcile such a case as *Dickson v. Township of Haldimand* (1903), 2 O.W.R. 969, with *Huffman v. Township of Bayham* (1899), 26 A.R. 514, as the effect of the wall in the first case was similar to that of the milkstand in the other. The distinction, no doubt, is in the person who erected the respective obstructions or nuisances.

The present case, I think, comes within sec. 104, as contended by the defendants, and they are entitled to have the case tried without a jury. (This would not improbably be the course adopted even if the jury notice was technically regular). If the principle laid down by Lister, J.A., in *Huffman v. Township of Bayham*, *supra*, is correct, it would seem clear that this is "non-repair," as the statement of claim alleges negligent construction of the pavement as being on the incline, and made with an exceedingly smooth surface, which is especially dangerous in moist weather, and this was not guarded against by having the ordinary rough finish, which it is at once usual and prudent to adopt in such cases.

The allegations here are very similar to those in the case of *Ince v. City of Toronto* (1900), 27 A.R. 410, (1901), 31 S.C.R. 323, which was tried without a jury.

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Costs to the defendants in any event.

“Non-repair” seems to mean any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be “non-repair” within the words of the statute as interpreted by the cases.

T. T. R.

[BRITTON, J.]

IN RE ESTATE OF CHARLES TUCK.

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June 21.

Will—Construction—Gift of Personal Property—"Before Receiving"—Rule in Shelley's Case—Restraint on Alienation.

A testator left to his wife his lands for her life together with "all my household furniture, personal property . . . to be for her use and behoof during her natural life in lieu of dower . . . and which possession is to be held by her so long as she shall remain my widow . . . All the personal property . . . that may be in possession of my said beloved wife at her decease and not otherwise disposed of, shall be sold by my executors . . . and the proceeds . . . equally divided among my daughters as being part of my estate :"—

Held, that the widow took absolutely all the personal property which she appropriated to her own use and used up during her life, and that there was a gift over of only so much of the personal property as was in the possession of the widow at the time of her death.

The testator, also, directed that certain lands should at the decease of his wife be sold, and the proceeds divided among his daughters, and that if any one or more of the daughters should "be deceased before receiving her or their interest or share," her or their heirs should inherit the same; and if she had left no legal heir, then over. One of the daughters survived her mother, and became entitled to a share, but had not at her own death, actually received the whole of her share. She died unmarried :—

Held, that the share had become vested at the time of her death, and must be paid to her estate.

The testator, also, devised to one of his sons for his life "and his lawful heirs after him," certain lands, "to have and to hold the same during his natural life, and subject to this express condition, that he shall have no power to sell . . . the above real estate, but shall transmit to his lawful heirs unimpaired if he shall have any . . . and should he fail to have any lawful heirs, the said lands shall at his decease be sold, and the proceeds equally divided among the other legatees :—

Held, that the son took the fee under the rule in *Shelley's case*; and the restraint on alienation was invalid.

THIS was an application to determine the proper construction of the will and codicil of Charles Tuck, deceased, who died on May 26th, 1877, which was argued before BRITTON, J., in Weekly Court, on May 17th and June 13th, 1905.

E. H. Cleaver, for the executors.

S. F. Washington, K.C., for Elizabeth Thompson.

F. Ford, for estate of Mary A. Tuck, and estate of Martha Tuck.

W. T. Evans, for infant children of Susan Thomson.

James Bicknell, K.C., for William Tuck.

F. W. Harcourt, for infant children of Wm. Tuck.

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The points argued are indicated in the judgment.

The following were cited: Theobald on Wills, 6th ed., pp. 395, 564, 610; *Myers v. Washbrook*, [1901] 1 K.B. 260; *Martin v. Martin* (1866), L.R. 2 Eq. 404; *Whitman v. Aitken* (1866), *ib.* 414; *Johnson v. Crook* (1879), 12 Ch. D. 639; *Minors v. Battison* (1876), 1 App. Cas. 428; *Breton v. Mockett* (1878), 9 Ch. D. 95; Jarman on Wills, 5th ed., pp. 333, 1170, 1627; *Re Dodgson's Trust* (1853), 1 Dr. 440; *Re Stevens* (1887), 14 O.R. 707; *Mathews v. Gardiner* (1853), 17 Beav. 254; *Simpson v. Ashworth* (1843), 6 *ib.* 412; *Re Winstanley* (1884), 6 O.R. 315; *Re Northcote* (1889), 18 *ib.* 107; *Re Bell* (1899), 30 *ib.* 318; *Smith v. Faught* (1881), 45 U.C.R. 484; *Dickson v. Dickson* (1883), 6 O.R. 278; *In re Maybee* (1904), 8 O.L.R. 601; *Chandler v. Gibson* (1901), 2 *ib.* 442; *Roddy v. Fitzgerald* (1858), 6 H.L. 823, 877; *Van Grutten v. Foxwell*, [1897] A.C. 657, 684-5; *Bowen v. Lewis* (1884), 9 App. Cas. 890; *In re Ferguson, Bennett v. Coatsworth* (1897), 24 A.R. 611; 28 S.C.R. 38; *Blackburn v. McCallum* (1903), 33 S.C.R. 65.

June 21. BRITTON, J.:—The following are the questions raised upon which there was argument:—

1. What estate did the widow, Mary Ann Tuck, take in the personal property of the deceased?

2. Martha Tuck, having survived her mother, Mary Ann Tuck, died before distribution of certain portions of the estate of Charles Tuck, and before receiving what is called her share. To whom is that share, or the unpaid portion of it, now payable?

3. William Tuck, son of deceased, is now living and has children, lawfully begotten. What estate does William Tuck take under the will? If only a life estate, who is entitled upon William's death?

4. Is the estate of Mary Ann Tuck liable for the taxes which accrued during her lifetime on the land which she held for life and which she permitted William Tuck to occupy, such taxes being for the years when William Tuck occupied?*

1. As to Mary Ann Tuck. She remained a widow, in possession of the property devised to her, until her death, which

*Two other questions were submitted, which did not raise matter for reporting.—Rep.

occurred on October 31st, 1902. She did as she pleased with the personal property. The words of the will which deal with this property are the following:—

“ Also I give, devise, leave and bequeath to my said wife the full possession and occupation of the lands and premises now owned by me for and during her natural life, together with all the hereditaments and appurtenances thereunto belonging or appertaining, and not otherwise herein disposed of, together with all my household furniture, personal property, goods and chattels, money, notes and securities for money of every kind soever to be for her use and behoof during her natural life, in lieu of dower, which she consents to accept instead thereof, and which possession is to be held by her so long as she shall remain my widow, the possession or occupation of said lands shall also include all live stock, implements of husbandry and household furniture of which I shall be seized or possessed of at my decease, together with full and undivided use of the dwelling house and all other houses on said premises.” . . .

“ And, finally I do hereby will and ordain, that all the personal property consisting of goods, chattels, money or notes receivable of what kind soever that may be in possession of my said beloved wife at her decease, and not otherwise disposed of shall within one year after her decease, be sold by my executors hereinafter named, and the proceeds or moneys arising from the same shall be equally divided among my daughters as being part of my estate.”

I am of opinion that the widow, Mary Ann Tuck, took absolutely all of the personal property which she appropriated to her own use and used up, during her life, and that there was a gift over of only so much of the personal property of Charles Tuck as was in the possession of the widow at time of her death. This is in accord with the exact words of the will, as the gift over is only of such of the personal property as “ may be in possession of my beloved wife at her decease, and not otherwise disposed of.” These words appear to me quite as strong as words stating that the wife “ should not be liable to account for any diminution or depreciation.”

In *Breton v. Mockett*, 9 Ch. D. 95, it was held that under

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these words added to a gift of farming implements and stock the widow took an absolute interest in them.

In *Myers v. Washbrook*, [1901] 1 K.B. 360, it was held that farming stock and implements of husbandry are not things *quæ ipso usu consumuntur*, and a bequest for life does not confer upon the legatee an absolute interest even though the legatee takes no interest in the farm. *Breton v. Mockett* is distinguished because of the words "should not be liable to account for any diminution or depreciation."

If a personal use which may exhaust the subject of the gift is permitted, then the legatee may take and does take absolutely such part as has been so used—or all if so used. There was no obligation on the part of the widow to carry on the farm or to replace, or to repair. The deceased carefully protected, so far as he could, the land from waste, but the widow was given such absolute control over and right to deal with the personal property as to make her interest in it an absolute one so far as she chose during her life to assert it, and to appropriate the property. The words "not otherwise disposed of" in the part of the will under consideration mean "not otherwise disposed of" by the widow, and if so, the widow had by implication the unqualified right of disposing of the personal property. The gift over is of what might be left. It is preceded by a form of disposition or appropriation.

Surman v. Surman (1820), 5 Mad. 123, is a case where a testator bequeathed his personal estate to his wife for life or widowhood, with power to apply the same to her own benefit and maintenance, etc., and at her decease, or marriage, he gave the same, or so much as should remain to certain persons, and it was held to be a good bequest of such of the personal estate as was unappropriated to the prescribed purposes.

The view I have taken of this is in accord with the opinion of the widow herself. In her will, in dealing with the personal property, she speaks of it as property, "which I may own at my decease, *in my own right*, consisting of household furniture and effects, beds and bedding, books, plate, and other goods and chattels, including live stock of all kinds, implements of husbandry, and other necessary utensils, all of which have been accumulated

or procured by me in my own right since the decease of my lamented husband."

I am of opinion that there need be no accounting by the estate of Mary Ann Tuck to the estate of Charles Tuck beyond the handing over or accounting for that part of the personal estate if any which, in specie, belonged to the estate of Charles Tuck, and which was actually in possession or control of Mary Ann Tuck at time of her death.

2. As to Martha Tuck. She died on January 9th, 1903. She survived her mother and became entitled to share under her father's will, but, she had not at the time of her death actually received the whole of her share. . The part of the will referring to the daughters is as follows:—

"And also, I hereby will and ordain that, at the decease of my beloved wife, Mary Ann Tuck aforesaid, the said lot . . . shall be sold for the benefit of my daughters, the legatees hereinafter named. . . .

"And the moneys arising from the sale of said lot . . . shall be equally divided among my daughters, the legatees of this my will, share and share alike. . The names of my daughters, the legatees herein named, and who are all alive at the date hereof, are as follows:— . . .

"And if any one or more of the above-named legatees shall be deceased before receiving her or their interest or share in or from my estate, then and in such case, her or their heirs shall inherit the same, and if any one or more of the above legatees shall have become deceased, and have left no legal heirs then her or their shares shall revert to the other legatees or their heirs, and shall be equally divided among them."

The share of Martha had become vested at the time of her death, and that share must be paid to her estate.

The words, "before receiving," might, in this case, well be interpreted as "before time to receive," or, "before entitled to receive;" but it is not necessary to support my conclusion that I should so decide. *Martin v. Martin*, L.R. 2 Eq. 404, cited by counsel for the devisees of Martha, seems expressly in point, if it can be accepted as authority after the disapproval of it in *Johnson v. Crook*, 12 Ch. D. 639.

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Martin v. Martin decided that the limitation over on death before *actually receiving* was inoperative in law.

In *Johnson v. Crook*, Jessel, M.R., intimates very pointedly that Wood, V.-C., in *Martin v. Martin*, was quite wrong in saying that such a gift over was inoperative in law, and that Wood, V.-C., had made a mistake, as other Judges sometimes do, and as he, the learned Master of the Rolls, more than once had done.

But after all the case of *Johnson v. Crook* only decided two things:

1. That, in that particular case, the gift was not void for uncertainty, but took effect, and

2. That the proposition stated in *Martin v. Martin*, viz., that "the limitation over on death before actually receiving was inoperative," is not law.

Johnson v. Crook is very different in its facts from the present case. There was the clear intention that such part of the legacy as had not been *actually* received should go over. The words 'but in case K. shall die before he shall actually have received the whole of his share and without leaving issue living at his decease, then, and in such case, and whether the same shall have become due and payable or not, such part or parts as he shall not have actually received to be paid to G.' put the matter beyond question, that there was no "vesting." Nothing was left to be considered but the actual receipt of the money. The learned Master of the Rolls emphasizes the words "*whether the same shall have become due and payable or not.*"

I find in the concluding part of his judgment the following, at p. 653: "Where the gift over is not quite clear, that is where it is susceptible of two meanings, what has been called *received de jure* and *received in fact*, or what might, perhaps, be better expressed as actually received and entitled to receive, there the presumption of law being in favour of not divesting a gift except there are clear words to take it away, and there being two possible meanings, you are to prefer that which leads to the least inconsistency, or it might be said, as was said in two of the cases, you are to prefer that which is the more convenient of the two." In the present case there are two possible mean-

ings, and the one most consistent with the testator's will and least inconvenient is, that Martha's share was not divested.

The text in Jarman on Wills, 6th ed., at p. 1627, is applicable. "Actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy, and thus indefinitely postpone the absolute vesting of it. If, therefore, the will points out a different time when the right to receive the legacy accrues, either expressly, or by directing payment at a particular age or time, or by implication from the disposition of the will, as upon the determination of a prior life estate, the gift over will be referred to that time."

In this case the legacy to Martha was vested in possession by the death of her mother, the tenant for life: Jarman, 6th ed., p. 1624.

3. In attempting to determine what estate William Tuck took under his father's will I must, if possible, ascertain from the will itself just what the testator intended, and give effect to that unless there is some rule of law according to which the will must be interpreted.

Very likely it was the intention of the testator that William should have only an estate for life in this property, and that after his death the property should go to the children of William, if there were children to take it. The words of the will are, "Also, at and upon the decease of my beloved wife, I give and devise to my son William Tuck for and during his natural life, and *his lawful heirs* after him, subject, nevertheless, to the provisions and conditions herein contained all that certain parcel," etc. . . . "to have and to hold the same from and after the decease of my said beloved wife during his natural life, and subject to this express condition, namely, he, the said William Tuck, shall have no power to sell, nor any right to dispose of the above real estate, or any part thereof, but shall transmit to his lawful heirs, unimpaired, if he shall have any; moreover he shall not cut down or dispose of timber from off the said parcel of land during his lifetime, but he may use of the same such an amount as may be reasonably necessary for firewood and repairs on said premises. . . . And I further will

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and ordain that should my said son, William Tuck, fail to have any lawful heirs then my will is, and I ordain and direct that the said lands and premises thus devised shall, at his decease, be sold, and the proceeds arising therefrom be equally divided among the other legatees, or their lawful heirs. And I further will and ordain that whether my said son shall have lawful heirs to inherit after him or fail therein, the above provisions made by me in his favour shall be and constitute his entire share in my estate."

It must be held, I think, that this falls within the rule in *Shelley's case*, and that rule must be applied. Lord Macnaghten in *Van Grutten v. Foxwell*, [1897] A.C. 658, at p. 672, says: "The rule is a rule of law, 'inflexible,' as it was termed by one of the noble Lords, who spoke in the subsequent case of *Roddy v. Fitzgerald*, 6 H.L.C., at p. 879, operating invariably, and, so to speak, automatically, whenever the limitations are such as to call for its application. Proceeding on that footing this House had only to construe the words of the will according to the established rules of construction. The most important of those rules for the purpose in hand was stated by Lord Redesdale, in the following words: 'The rule is that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise.' What is to be understood by 'otherwise' is shewn, I think, by the last words of the passage in which the rule was repeated in *Roddy v. Fitzgerald*, 'It is another and most important rule,' said Lord Wensleydale, 'in the construction of the words used in a will, that technical terms, or words of known legal import should have their proper legal effect attributed to them, although the testator uses inconsistent terms or gives repugnant and impossible directions. To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to shew what sense that is.'"

The simplest way in which this "rule in *Shelley's case*" has ever been put, it seems to me, is when Lord Thurlow stated (3 Juriscon. Ex. 360), he did not "remember the time when he thought the application of the rule in *Shelley's case* could

depend upon anything else but the question whether the word 'heirs' was the designation of some particular person, or included successively all who might pretend to inheritable blood."

Again in same case Lord Davey, at p. 684 :—

"I feel very strongly the importance of adhering to the rule that technical expressions and words of known legal import shall receive their ordinary legal meaning. The neglect of this rule, in my opinion, tends to increase uncertainty in the construction of instruments, and to multiply the difficulties of those who have to advise upon them; and, therefore, to foster litigation. . . . In my opinion the rule in *Shelley's case* is a rule of law, and not a mere rule of construction."

Page 685.—"Wherever, therefore, the Court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life even though the testator has expressly declared that the ancestor shall take for life and no longer, and has endeavoured to graft upon the words of gift to the heir or heirs of the body—additions, conditions or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to."

See also *Grant et al. v. Squire et al.* (1901), 2 O.L.R. 131; *Chandler v. Gibson*, 2 O.L.R. 442; *Re Thomas* (1901), 2 O.L.R. 660 Theobald on Wills, 6th ed., p. 404; *Matthews v. Gardiner*, 17 Beav. 254.

I am, therefore, constrained to hold that the effect of what the testator did was by the operation of the rule to give the fee simple in the land mentioned to William Tuck. I do so with reluctance, fearing that in so doing the real wish of the testator will not be complied with.

If William took an estate in fee simple then the restraint on alienation as attempted in this will is invalid.

I have gone through the cases, to which I was referred, and can find no authority for upholding any such general and absolute restraint.

4. The estate of Mary Ann Tuck is liable to the estate of Charles Tuck for taxes which accrued during her lifetime on the land which she had for life, such taxes being for the years she permitted William Tuck to occupy it.

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Whether William Tuck is liable to the estate of Mary Ann Tuck, or to any one else, depends upon the arrangement between William Tuck and his mother.

It is not for me, upon this application, and upon the material before me, to attempt to decide what the rights of the executors of Charles Tuck are as against the estate, which they are administering, or how they shall recover the amount paid by them for taxes in the event of their not being able to get repayment from the estate of Mary Ann Tuck.

A. H. F. L.

[BRITTON, J.]

QUEEN'S COLLEGE V. JAYNE.

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April 28.

Vendor and Purchaser—Contract for Purchase of Land—Negotiations—Incomplete Contract—Specific Performance.

The plaintiffs' solicitor wrote to the defendant suggesting that the latter should offer \$13,000 for a farm owned by the plaintiffs, of which the defendant had a lease. The defendant wrote in answer, "I have concluded to purchase the farm at your price, \$13,000;" and the plaintiffs' solicitor replied, "I accept your offer of \$13,000." In none of these letters was anything said about the terms of purchase, except that in the first the solicitor stated that the terms of payment could be made very easy. At a subsequent interview between the defendant and the solicitor, terms of payment were discussed, and the solicitor made an informal memorandum of the mode, time, and amount of payments to be made by the defendant, which the defendant signed, but refused to sign a formal agreement afterwards drawn up by the solicitor, containing the same provisions with the addition of one for payment of interest:—

Held, that no completed contract had been established; and an action to compel specific performance was dismissed.

Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616, and *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, followed.

ACTION to compel the defendant to carry out an alleged agreement for the purchase by him of a farm known as the "Blanchard farm," in the township of North Fredericksburg. The facts are stated in the judgment.

The action was tried at Kingston before BRITTON, J., without a jury, on the 19th April, 1905.

J. M. Farrell, for the plaintiffs.

J. L. Whiting, K.C., for the defendant.

April 28. BRITTON, J.:—The plaintiffs were mortgagees in possession of the farm in question. On the 28th November, 1903, the plaintiffs leased this farm to the defendant for 3 years from the 2nd March, 1904, at a yearly rental of \$500.

On the 26th December, 1903, the plaintiffs' solicitor wrote to the defendant the following letter:—

"Kingston, Ont., December 26th, 1903.

"Dear Sir:—

"Blanchard was here on Thursday and talks of having an offer for the farm of \$13,000. If he could get a purchaser at that figure, he might be able to bother us about the lease.

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Can't you head him off by offering that figure yourself? We could make the terms of payment very easy, and now that we are committed to you, we would rather stay with you, but the place has to bring \$13,000, or it won't be sold.

"Yours truly,

"G. M. Macdonnell.

On the 29th December the defendant replied:—

"Napanee, Ont., December 29th.

"G. M. Macdonnell, K.C.,

"Kingston, Ont.

"Dear Sir:—

"I received your letter of the 26th yesterday.

"I have concluded to purchase the farm at your price, \$13,000. Hoping to hear from you by next mail, I will close.

"Yours truly,

"Adam H. Jayne."

To which the plaintiffs' solicitor replied:—

"Kingston, Ont., December 29th, 1903.

"Adam H. Jayne, Esq.,

"Napanee, Ont.

"Dear Sir:—

"I have yours of this date and I accept your offer of \$13,000 for the Blanchard farm.

"Yours truly,

"G. M. Macdonnell.

"P.S. Let Blanchard have the butter, etc., under your agreement."

On the 18th January, 1904, the defendant wrote to Mr. Macdonnell a letter which is not produced and to which Mr. Macdonnell replied on the 19th January, 1904, as follows:—

"Kingston, Ont., January 19th, 1904.

"Adam H. Jayne, Esq.,

"Napanee, Ont.

"Dear Sir:—

"I have yours of the 18th inst. It is all right about the hay-stack of 1902 on the south-west 50 acres. Let Mr. Blanchard sell it. He to account for the proceeds. Blanchard will not give you any trouble. We are getting settled satisfactorily,

I think. When will you be down? We want to settle the agreement for purchase.

"Yours truly,
"G. M. Macdonnell."

And on the 20th January the defendant wrote:—

"Napanee, Ont., January 20th, 1904,

"G. M. Macdonnell, K.C.,

"Kingston, Ont.

"Dear Sir:—

"I received your letter of January 19th.

"Mr Allison has written me to let no one have the hay-stack. As you had written me to take my orders from him, I wrote him Saturday concerning the hay-stack, and Monday Mr. Knight wrote me as I told you in my last letter, and this morning Mr. Allison sent me a letter saying to let no one have it.

"I am very busy just now, but when I get some of my work straightened up I will go to Kingston to see you. I remain,

Yours truly,

"Adam H. Jayne."

On the 4th February, 1904, the defendant was in Kingston and met the plaintiffs' solicitor, when terms of payment were discussed, and the solicitor wrote the following as the result of their conversation:—

"Jayne proposes to turn over to us the cheques from the cheese factory for his milk money, beginning with June next, to be applied in payment of purchase money on his purchase of Blanchard farm.

"He will pay \$200 this year, \$300 in 1905, and \$500 a year after that, he to have the privilege of paying any amount on account of his purchase money at any time, interest on amounts so paid to cease on day of payment."

This paper was signed by the defendant. The solicitor then drew up, on the usual printed form, a full agreement embodying all terms and making terms of payment as follows: \$200 on or before the 1st November next, \$300 on or before the 1st November, 1905, and the remainder in annual payments of \$500 each, with interest at 4½ per cent. from the 4th

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Britton, J. February, 1904, payable half-yearly on the 15th days of
1905 November and May in each year, with privilege to pay any sum
on account of principal at any time; interest to cease on pay-
ments so made.

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The defendant did not sign this agreement. He declined to do so, and Mr. Macdonnell told the defendant to take it home and consider it, and this the defendant did, and then followed a correspondence, with the result that from that time the parties were not *ad idem*, and the defendant finally declined to carry out his proposed purchase and asserted his right to hold the property under the lease of the 28th November.

It was shewn that in this case the plaintiffs did not expect that the defendant would pay cash. It was known that the defendant was not able to pay cash and would require time and that terms of payment would have to be agreed upon. The paper signed by the defendant on the 4th February, 1904, did not fully state these terms. The rate of interest was omitted, although verbally $4\frac{1}{2}$ per cent. *per annum* was agreed. The plaintiffs shew that the agreement was not complete, by stipulating for the further terms embodied in the formal document drawn, which the defendant was allowed to take home and consider, and to which the defendant never assented. The case in this respect seems to me to be governed by *Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs* (1890), 44 Ch. D. 616, and *Hussey v. Horne-Payne* (1879), 4 App. Cas. (H. L.) 311. If the Court has to find the contract from the correspondence, "the whole of that which passed must be taken into consideration," and taking all that passed I arrive at the conclusion that negotiation never ripened into contract.

The defendant's first letter is simply an unconditional offer to purchase. He says, "I have concluded to purchase the farm at your price." That, I think, in view of all that took place both before and after that letter was written, was simply a statement that the defendant would go up to \$13,000 as the price if they could agree upon terms. Although the plaintiffs' solicitor treated this letter as an offer, which he at once accepted, he then fairly and properly expected that terms would

have to be embodied in a formal agreement before negotiations ended.

It is not necessary to quote from the judgment of the Lord Chancellor or that of Lord Selborne in *Hussey v. Horne-Payne*, but I may say that one seldom finds a case which so completely covers the one in hand.

Upon all that passed, I think no completed contract has been established, and that the action must be dismissed with costs.

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ONTARIO LADIES' COLLEGE V. KENDRY.

April 12.

Company—Subscription for Shares—Conditional Subscription—Condition not Fulfilled—Representations of Agent—Materiality—Evidence—Corroboration—Written Contract—Contemporaneous Oral Contract.

In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiffs' agent that two other named persons had each subscribed \$10,000 of shares upon the condition that subscriptions for \$50,000 were obtained by a certain date; that the defendant's subscription was required to make up the \$50,000; and that his subscription would not be binding unless the \$50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for \$10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that \$50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiffs' agent having died some years before the commencement of the action; and the trial Judge credited the testimony:—

Held, that it was sufficient without direct corroboration, and, in the absence of facts or circumstances of countervailing weight, should be accepted.

Held, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not.

Held, lastly, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement.

Wallis v. Littell (1861), 11 C.B.N.S. 369, applied and followed.

APPEAL by the plaintiffs from the judgment of Boyd, C., who tried the action without a jury, and dismissed it without costs.

The following statement of facts is taken from the judgment of Moss, C.J.O.:—

The plaintiffs are a corporation, and bring this action to recover from the defendant the sum of \$500, the amount of five shares of their capital stock, for which the defendant subscribed on the 20th April, 1892, together with interest thereon from the dates upon which the calls became payable. The gist of the defence as disclosed by the evidence, though somewhat obscurely set forth in the statement of defence, is, that the defendant was induced to become a subscriber for shares by the representations of the plaintiffs' agent by whom he was solicited, to the effect that Mr. G. A. Cox and Mr. H. A. Massey had each subscribed

or promised to subscribe for \$10,000 of stock, upon the condition that subscriptions for \$50,000 were obtained on or before the 1st January, 1893; that the defendant's subscription was required in order to assist in making up what was still required of the \$50,000; and that his subscription would not be binding unless the \$50,000, including the subscriptions of Messrs. Cox and Massey, was fully subscribed on or before the 1st January, 1893. It may be noted that the statement of defence gives the 1st January, 1892, but at the trial this was altered to 1893.

It was proved that neither Mr. Cox nor Mr. Massey had subscribed or promised to subscribe for \$10,000 each, either conditionally or unconditionally, nor did they do so at any time time after the defendant's subscription, nor was \$50,000 subscribed on or before the 1st January, 1893.

The learned Chancellor held that the representations were proved to have been made, that by reason of them the defendant was induced to subscribe the stock "as a sort of escrow, it was not to be effective or operative unless the \$50,000 was obtained within the limited period."

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 22nd and 23rd February, 1905.

G. H. Watson, K.C., and J. B. Dow, for the plaintiffs, appellants. The defendant gave no notice repudiating his contract, and the plaintiffs acted and relied upon the subscription. The defendant is now estopped by laches from seeking to repudiate. The plaintiffs were incorporated by 41 Vict. ch. 68 (O.) Section 34 of the Joint Stock Companies Act authorizes a certificate of non-payment to prove default. The subscription was not revocable, the shares were allotted, and the contract was complete: *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481. The agent had no authority to make representations, and the plaintiffs are not bound: *Cook on Stock and Stockholders*, 3rd ed., secs. 60, 81, 137; *Watkins v. Nash* (1875), 44 L.J. Ch. 505; *Ward v. Lewis* (1827), 4 Pick. 518, 520; *Kerr on Frauds*, 3rd ed., p. 84; *Hamilton's Company Law*, 2nd ed., p. 112; *Pearce v. Pearce* (1856), 22 Beav. 248; *In re Brampton and Longtown R.W. Co.* (1875), L.R. 20 Eq. 620; *Barnett v. South London*

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Tramways Co. (1887), 18 Q.B.D. 815; *British Mutual Banking Co. v. Charnwood Forest R.W. Co.* (1887), *ib.* 714. The representations alleged were not in fact proved, as a reference to the evidence will shew. The contract of the defendant was in writing, signed by him, and it should not have been varied or changed, nor should subsequent or collateral conditions not appearing in it be imported into it, and effect should be given to the Statute of Frauds. We refer to *Elkington's case* (1867), L.R. 2 Ch. 511; Cook on Stock and Stockholders, 3rd ed., sec. 78; *In re Publishers' Syndicate* (1902), 3 O.L.R. 552; *Bullivant v. Manning* (1877), 41 U.C.R. 517; Lindley on Companies, 6th ed., p. 589; *Deposit, etc., Life Ass'ce. Co. v. Ayscough* (1856), 6 E. & B. 761; *Willmott v. London Celluloid Co.* (1886), 34 Ch. D. 147; *National Ins. Co. v. Egleson* (1881), 29 Gr. 406; *Re Standard Fire Ins. Co.* (1884), 7 O.R. 448. The defendant asks by way of counterclaim to have the plaintiffs' stock register rectified by striking off his name; but his claim, if any, to that relief is barred by the Statute of Limitations: *Dickson v. Jarvis* (1839), 5 O.S. 694. Evidence of other alleged subscriptions and statements made by the agent to other persons was improperly admitted.

E. G. Porter and *S. T. Medd*, for the defendant, respondent. The evidence of statements to other persons was admissible as corroboration of the defendant's testimony: *Blake v. Albion Life Assurance Society* (1878), 4 C.P.D. 94. Upon the evidence the plaintiffs had not at the time of the defendant's subscription any shares which they could lawfully allot to the defendant: see 41 Vict. ch. 68 (O.); *Page v. Austin* (1882), 7 A.R. 1, (1884), 10 S.C.R. 132. In any event the plaintiffs never made any valid allotment of shares to the defendant: *Pellatt's case* (1867), L.R. 2 Ch. 527, 533; *Ramsgate Victoria Hotel Co. v. Montefiore* (1866), L.R. 1 Ex. 109; *Ward's case* (1870), L.R. 10 Eq. 659, 662; *Ritso's case* (1877), 4 Ch. D. 774; *Nasmith v. Manning* (1880), 5 A.R. 126; *Sahlgreen and Carrall's case* (1868), L.R. 3 Ch. 323; *Karberg's case*, [1892] 3 Ch. 1; *In re Canadian Direct Meat Co.*, [1892] W.N. 94; *In re Scottish Petroleum Co.* (1883), 23 Ch. D. 423; *In re London Speaker Printing Co.* (1889), 16 A.R. 508. The subscription signed by the defendant was so signed on the conditions found by the

Chancellor, and never became a contract, the conditions not having been fulfilled; and evidence was admissible to shew what the true agreement was: *Pym v. Campbell* (1856), 6 E. & B. 370, and cases there cited. The agent referred to in the evidence was duly authorized to canvass for stock subscriptions and the plaintiffs are bound by the representations which he made in canvassing. The evidence establishes that the representations alleged were made, and were untrue.

Watson, in reply.

April 12. The judgment of the Court was delivered by Moss, C.J.O.:—For the plaintiffs it was contended that the defendant failed to prove the representations. They were distinctly sworn to by the defendant, and were not contradicted.

It appears that the agent by whom they were made died some years before the commencement of the action, and, as the learned Chancellor pointed out, if the plaintiffs were prejudiced for want of his evidence, it was due to their delay in bringing the action. The learned Chancellor gave credit to the defendant's testimony, and there is no law applicable to this case which disables a party from succeeding upon his own uncorroborated testimony. The law of England on the point was thus stated by Sir James Hannen: "The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man brings conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction being acted upon." *In re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177, at p. 183. And see the remarks of Lord Russell of Killowen, C.J., in *Rawlinson v. Scholes* (1898), 79 L.T. 350. The law of this Province is only different in the cases, such as in actions by or against the representatives of deceased persons, where there is a statutory provision requiring corroboration as to matters which occurred in the lifetime of the deceased.

In the present case there are circumstances tending to corroborate and support the defendant's statements, but at all events

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there are no facts or circumstances of such countervailing weight as to render it proper not to give effect to the learned Chancellor's conviction.

It was also urged that the plaintiffs were not bound by the representations of their agent. He was undoubtedly their agent to solicit subscriptions for shares, and the plaintiffs are now seeking to take the benefit of what he did in the matter of procuring the defendant's subscription. It is clear law that if an agent at the time a contract is entered into makes any representation or declaration touching the subject matter, it is the representation or declaration of his principal; and it is now settled that a principal cannot enforce a contract induced by the material misrepresentations of the agent who negotiates it, whether such misrepresentations are fraudulent or not: *Kerr on Frauds*, 3rd ed., p. 83, and cases. Here the representations were material, and whether made in good faith and with a belief in their certain fulfilment or not, they cannot be ignored or repudiated by the plaintiffs.

It was also argued that the defendant's case upon the pleadings, as well as upon the evidence, is, that the contract was a conditional contract or agreement, and that the contract upon which the plaintiffs are suing being in writing and on its face unconditional, evidence to vary it was inadmissible as against the provisions of the Statute of Frauds. If the case is to be viewed as a case of a contract induced by material representations which were untrue, the argument would be inapplicable. But regarding the case from the other standpoint, the answer to the argument seems to be that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement. In *Wallis v. Littell* (1861), 11 C.B.N.S. 369, the parties entered into a written agreement to assign a farm, and at the same time there was an oral agreement that the written agreement was to be void if Lord Sydney, the landlord, did not agree to the assignment. It was held, following *Davis v. Jones* (1856), 17 C.B. 625, and *Pym v. Campbell*, 6 E. & B. 370, that the contemporaneous oral agreement might be proved, and that the oral testimony was admissible. Erle, C.J., said (p. 375): "It is in

analogy with the delivery of a deed as an escrow: it neither varies nor contradicts the writing, but suspends the commencement of the obligation." The case was distinguished in *Abrey v. Cruik* (1869), L.R. 5 C.P. 37, 42, but its authority was not questioned.

The circumstances of this case seem to bring it within the rule laid down in *Wallis v. Littell*. The contract, it is true, appears on its face to be a completed contract, but it was to have no beginning whatever except upon the happening of a stipulated contingency, which did not occur. Whichever view is taken of the evidence, the plaintiffs' case fails.

The appeal must be dismissed.

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[STREET, J.]

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SIMS ET AL. V. GRAND TRUNK R. W. CO.

April 27.

Railway—Negligence—Injury to Person Crossing Track—Failure to Look for Train—Contributory Negligence—Case for Jury.

The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries :—

Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury.

Morrow v. Canadian Pacific R. W. Co. (1894), 21 A.R. 149, and *Vallee v. Grand Trunk R. W. Co.* (1901), 1 O.L.R. 224, followed.

ACTION to recover damages for injuries sustained by the plaintiff Alexander Sims, owing to the alleged negligence of the defendants or their servants, by reason of which that plaintiff was struck by the engine of a train at a highway crossing.

The action was tried before STREET, J., and a jury at Toronto on the 19th and 20th April, 1905.

John MacGregor, for the plaintiffs.

W. R. Riddell, K.C., and *J. P. Mabee*, K.C., for the defendants.

April 27. STREET, J.:—The plaintiff Alexander Sims was between 18 and 19 years of age, and was employed as a cabinet maker; he was injured at a highway crossing within the limits of the city of Toronto by a train of the defendants, in the following circumstances:—He was riding a bicycle in an easterly direction along the south side of Bloor street west on the 23rd July, 1903, at about six o'clock in the evening. He had been along the same road several times; he knew that the defendants' track crossed Bloor street at the point in question, and he knew at the time that he was approaching the track, and that trains frequently passed up and down upon it. The crossing itself is visible for a considerable distance, being somewhat above the level of the highway, and being marked at the sides by whitewashed fences and crossing boards. When the plaintiff

reached a point 137 feet distant from the nearest rail, he had an unobstructed view of the track to the north of the crossing for the distance of 1,000 feet, and, had he looked, might have seen for the whole of that distance the approach of a freight train coming south. He did not look either to the right or to the left, and he says that he was struck by the engine as the front wheel of his bicycle was crossing the westerly rail of the track, and that until the instant before he was struck he did not see the engine at all. He says that if he had seen the engine when he was within ten feet of the track he could have saved himself by turning his bicycle, as he was not going fast at the time.

There was some evidence that the usual statutory signals were not given.

The defendants' counsel moved for a nonsuit at the close of the plaintiffs' case, and I reserved my decision upon the motion, allowing the case to go to the jury in the meantime.

The jury found in answer to questions submitted to them :

1. That the statutory signals were not given.
2. That the engine struck the plaintiff, and that he did not run into the engine.
3. That there was no obstacle to prevent the plaintiff's view up the track for the distance of a quarter of a mile after he had passed the greenhouse.
4. That the plaintiff could not, by using reasonable care, have avoided the accident.
5. That the cause of the accident was the want of proper warning.
6. That the train was travelling at the rate of 15 to 20 miles an hour.
7. That this was an excessive rate of speed.
8. They assessed the damages to the plaintiff who was injured at \$2,200, and to his father at \$300.

The greenhouse mentioned in the answer to the 3rd question was so placed that after passing it there was an unobstructed view for a quarter of a mile up the track during the progress of the plaintiff for 137 feet along Bloor street before he reached the track.

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The defendants' motion for a nonsuit was renewed before the jury brought in their verdict, and now comes on for decision along with the plaintiffs' motion for judgment.

According to the latest authorities, I should have been wrong in withdrawing this case from the jury. The defence that the plaintiff should have looked out for the train is one of contributory negligence, and this defence it is now said must be left to the jury: *Morrow v. Canadian Pacific R. W. Co.* (1894), 21 A. R. 149; *Vallee v. Grand Trunk R. W. Co.* (1901), 1 O. L. R. 224.

The motion for nonsuit must, therefore, be refused, and judgment should be entered for the plaintiffs in accordance with the findings of the jury, with costs.

E. B. B.

[ANGLIN, J.]

CLEARY V. CORPORATION OF THE TOWN OF WINDSOR.

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June 30.

Municipal Corporations—By-laws for Raising Money—Sanction of Electorate—Variance from—Sidewalks—Width of—Ultra Vires.

A municipal by-law, duly passed and approved by the electors, provided for raising money on debentures to be applied solely on the construction of sidewalks along a certain street, to be completed during 1904, and to be five feet wide; and it delegated the matter of line or grade to the city engineer. Its validity being objected to in 1905, two further by-laws were passed adopting the engineer's plan, and providing for the construction of the sidewalks during 1905, with a width of four feet only; but these were not submitted to the electorate:—

Held, that these two last by-laws were *ultra vires* as extending the time allowed by the first one for construction of the sidewalks, and altering the width, and so varying the purpose for which the money had been voted under it. Injunction granted to restrain the raising of the money.

THIS was an action tried before ANGLIN, J., without a jury at Sandwich on June 20th, 1905, in which the plaintiff claimed an injunction and damages under the circumstances stated in the judgment.

F. E. Hodgins, K.C., and J. L. Murphy, for the plaintiff.

A. St. G. Ellis, for the defendants.

The following cases were cited on the argument: *Ayers v. Corporation of the Town of Windsor* (1887), 14 O.R. 682; *Pratt v. Corporation of the City of Stratford* (1887-8), 14 O.R. 260, 16 A.R. 5; *Tukey v. Omaha* (1898), 54 Neb. 370, 69 Am. St. Rep. 711; *City of Indianapolis v. Wann* (1895), 144 Ind. 175; *The Queen v. Churchwardens of All Saints, Wigan* (1876), 1 App. Cas. 611; *Bogart v. Township of King* (1901), 1 O.L.R. 496; *In re Gillespie and the City of Toronto* (1892), 19 A.R. 713; *Fleming v. City of Toronto* (1890-2), 20 O.R. 547, 19 A.R. 318; Endlich on the Interpretation of Statutes, p. 433.

June 30. ANGLIN, J.:—The plaintiff owns and resides upon a block of land situate on the north-east corner of London street and Crawford avenue in the city of Windsor and also a vacant lot of land on the west side of Crawford avenue, 38 feet north of London street. The defendants have

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constructed a permanent pavement on London street and have laid a silex sidewalk on the north side thereof. They propose to lay a silex sidewalk on the east and west sides of Crawford avenue. This latter work is under way and the plaintiff now seeks to restrain its further progress and to recover damages for injuries to his residential property occasioned by the completed work upon London street. Should he fail to obtain an injunction restraining the defendants from proceeding with the construction of the projected sidewalks on Crawford avenue, he asks the Court to assess and award him damages for the injury to his properties which he alleges the construction of these walks, as projected, will occasion.

The concrete sidewalks on Crawford avenue are being constructed under by-law of the municipal corporation of the city of Windsor, No. 1096, which was submitted for the approval of the electors on the 20th October, 1903, and was finally passed by the council on the 9th November, 1903. This by-law provides for the raising, by the issue of debentures, of a loan of \$56,000 for the purpose of paying for the construction and completion of the sidewalks mentioned in the by-law, to "be fully completed before the close of the year 1904." The by-law provides for a walk five feet wide upon each side of Crawford avenue.

Clause V. of the by-law enacts "That the proceeds of the said debentures shall be applied solely to the purpose of paying the costs of the aforesaid concrete sidewalks and to no other purpose whatever." The debentures are to be redeemed at the expense of the owners of all the ratable property in the municipality.

The by-law delegates to the "city engineer or other engineer who may by the council of the said city be appointed for that purpose in his stead" the duty of defining the line and grade upon which such sidewalks shall be constructed. An objection to the validity of the by-law upon this ground the council has attempted to cure while this suit has been pending, by two by-laws, Nos. 1147 and 1159, passed on the 16th and 22nd days of May, 1905, respectively, whereby they purport to adopt and confirm the grade and location of sidewalks to be constructed on Crawford avenue as shewn on a plan prepared by Wm. Newman, city engineer, and to reduce the width of such sidewalks

from five to four feet. These by-laws were not submitted to the electorate for approval. It is very questionable whether they are effective for the purpose intended. They purport to fix a grade for sidewalks of a width of four feet instead of five feet, to be constructed not in the year 1904, but in the year 1905. The by-laws were themselves passed after the time fixed by by-law 1096 for the completion of the walks for which it provides.

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The plaintiff complains that the construction of any sidewalk in the year 1905 and of sidewalks on Crawford avenue of a width of less than five feet at any time is unauthorized by the by-law, No. 1096, upon which the monies that it is proposed to expend on the Crawford avenue walks were raised.

The raising and the expenditure of this money is authorized by the vote of the ratepayers for a particular purpose. The municipal council has no power to vary or depart from that purpose. It is a trustee of the funds so raised, its trust being to expend them for the very purpose to which the ratepayers have devoted them: *Smith v. Raleigh* (1882), 3 O.R. 405; *Dillon v. Township of Raleigh* (1886), 13 A.R. 53, 64. If it can alter the width of the sidewalks to be laid on Crawford avenue, it can alter them on any other street affected by the by-law; if it may decrease the width from five to four feet, it may decrease it to one foot, or increase it to ten feet. If it can legally construct the sidewalks in 1905 instead of 1904, may it not defer their construction until 1910?

In my opinion the expenditure, upon the projected Crawford avenue walks, four feet wide, of monies raised under the by-law, No. 1096, will be illegal and should be restrained. As the defendants admittedly intend to construct these sidewalks under the authority of the by-law, No. 1096, they should be enjoined from further proceeding with the work upon them: *Tukey v. Omaha* (1898), 54 Neb. 370. The plaintiff will have his costs of the action, except so much thereof as were incurred solely in connection with his claims to recover damages.

At the trial I was pressed to hear evidence as to the injuries which the prosecution of the proposed work on Crawford avenue would cause to the plaintiff's properties. Though I was then strongly of the opinion that I could not entertain any claim for

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damages, whether in respect of the work already completed on London street, or of that which was in progress on Crawford avenue until suspended by the interim injunction issued in this action, and which if permitted to do so the defendants proposed to continue, I received all the evidence offered. I am satisfied that the plaintiff's remedy for any damages he may sustain is that provided by section 437 of the Municipal Act, R.S.O. 1897, ch. 223. Whether the laying of the new sidewalks on London street and Crawford avenue upon a materially higher grade than the old walks which they replace be work which the municipal corporation can only lawfully undertake when acting under the provision of a by-law, or be work which they can lawfully do without the sanction of a by-law, unless the work is obligatory repair the doing of which would give persons injuriously affected no right to compensation, the plaintiff must recover whatever damages (if any) he may be entitled to by pursuing the remedy prescribed by the Legislature: *Pratt v. Corporation of the City of Stratford*, 16 A.R. 5.

But while I may not in this action assess damages, present or prospective, so as to bind the parties, it may be that an expression of my opinion upon the evidence before me will be of use to them. It may aid them to arrive at a settlement, thus obviating the necessity of an arbitration under the statute, should means be found of proceeding with the work on Crawford avenue in a manner satisfactory to all persons interested.

[The learned Judge then proceeded to determine what damages he would assess if sitting as an arbitrator under sec. 437 of the Municipal Act].

A.H.F.L.

[TEETZEL, J.]

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May 18.

Will—Gifts to Religious Societies—"Charitable Use"—Date of Execution of Will—Six Months' Limitation—Statutes—Repeal by Implication—Religious Institutions Act—Mortmain Acts—Construction—"Land"—Proceeds of Sale.

A testatrix, dying on the 4th June, 1904, by her will, executed on the 4th December, 1903, gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of a church, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to a home missionary society and the other half to a foreign missionary society for their sole use.

By 50 Vict. ch. 91 (O.) these societies were authorized to receive gifts and devise of real and personal property, provided that no gift or devise of any real estate should be valid unless made by deed or will executed at least six months before the death of the testator. There is a similar provision in sec. 24 of the Religious Institutions Act, R.S.O. 1897, ch. 307:—

Held, that the six months' limitation contained in these two Acts must be regarded as having been repealed by sec. 4 of the later Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, the original of which was passed on the 14th April, 1892.

2. Gifts for religious purposes are within the term "charitable use" in sec. 4.
3. The gift was not of "land," as interpreted by sec. 3 of ch. 112, but of "personal estate arising from or connected with land," within the meaning of sec. 8.

In re Sidebottom, [1902] 2 Ch. 389, and *In re Ryland*, [1903] 1 Ch. 467, followed.

4. The statute which is now R.S.O. 1897, ch. 112, was based upon the English Act of 1891, and the Ontario Mortmain and Charitable Uses Act, 1902, upon the earlier English Act of 1888; but by sec. 1 of the Act of 1902 it is provided that that Act shall be read as part of ch. 112; and the result is to put the two Ontario Acts practically in the same position as the two English Acts (*In re Hume*, *Forbes v. Hume*, [1895] 1 Ch. 422); and therefore sec. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*.

Re Kinny (1903), 6 O.L.R. 459, followed.

MOTION by the executors of the will of the late Deniza Jane Barrett for an order under Con. Rule 938 declaring the construction of the will, the question for determination being whether the gifts to the trustees of the Baptist church at Port Rowan, Regular Baptist Home Missionary Society, and the Regular Baptist Foreign Missionary Society, were valid. The facts are stated in the judgment, and the argument, as regards the points decided, sufficiently appears in the judgment.

The motion was heard by TEETZEL, J., in the Weekly Court, on the 20th April, 1905.

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C. F. W. Atkinson, for the executors.*H. L. Drayton*, for charitable devisees and legatees.*G. F. Shepley, K.C., C. P. Smith, and A. H. Backhouse*, for other legatees.

May 18. TEETZEL, J.:—The estate consisted of \$3,900 realty and \$6,041 personalty.

The will was executed on the 4th December, 1903, and the testator died on the 4th June, 1904, and one question raised upon the motion was as to whether the full period of six months had elapsed between the making of the will and the death of the testatrix; but I do not consider it necessary to determine that question, in my view of the effect of the provisions of the Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, and the Mortmain and Charitable Uses Act, 1902.

The testatrix gave and devised all her real and personal estate to trustees to sell, and, after payment of certain small legacies and debts and expenses, she directed her executors to keep the residue of the moneys realized from the sale of the real and personal property and invest it in government bonds or other securities allowed by the laws of Ontario, and to pay the interest thereon to the trustees from time to time of the Regular Baptist Church at Port Rowan, upon certain conditions, and, on failure of compliance with the conditions therein mentioned, she directed one-half of the said moneys to be paid to the Regular Baptist Home Missionary Society and the other half to the Regular Baptist Foreign Missionary Society for their sole use.

By ch. 91 of 50 Vict. (O.), the said Missionary Societies or "Boards," as they are therein described, are authorized to receive gifts and devisees of real and personal property, "provided that no gift or devise of any real estate or of any interest therein shall be valid unless made by deed or will executed by the donor or testator at least six months before his death."

Sec. 24 of R.S.O. 1897, ch. 307, being the Act respecting the Property of Religious Institutions, provides that any religious society may, by the name thereof, or in that of trustees, etc., take by gift or devise any lands, etc., "if such gift, devise or

bequest is made at least six months before the death of the person making the same," etc.

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On the assumption that the full period of six months had not elapsed between the execution of the will and the death of the testator, and assuming also that the devise was one of "land" within the meaning of R.S.O. 1897, ch. 112, which provides (sec. 4) that "land may be devised by will to or for the benefit of any charitable use," without any provision or condition that such will should be made at least six months before testator's death, Mr. Shepley argued that, notwithstanding said section, the above cited statutes giving the authority to the charities in question here to receive devises of real estate, subject to the proviso that the same should be made at least six months before the testator's death, still remained in force, and that the gifts of land in this case, therefore, had not been emancipated from this condition by virtue of ch. 112.

I am of opinion that this argument cannot prevail.

The provisions of ch. 112 first became law on the 14th April, 1892, subsequent to both the above statutes. The Mortmain Act, 9 Geo. II. ch. 36, having been held to be in force in Ontario, it was impossible by will to devise lands to charitable uses except as provided for by the Religious Institutions Act, or by special Acts, such as ch. 91 of 50 Vict., above cited.

The object of ch. 112 was evidently to remove every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned, and should be construed as an enabling Act and as impliedly repealing all inconsistent or repugnant limitations and conditions contained in any previous Act curtailing the power of a testator to make an effective devise in favour of any charity at any time.

To hold that, notwithstanding sec. 4, a devise in favour of a religious institution would fail unless the will was made at least six months before the testator's death, would, I think, be to largely defeat the purposes of the Act.

It has long been held that gifts to religious purposes are within the term "charitable gifts or uses." See Tyssen's Charitable Bequests, p. 118 *et seq.*; also *Re Johnson* (1903), 5 O.L.R. 459.

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The six months' limitation contained in said two Acts being inconsistent with and repugnant to the provisions of ch. 112, as to wills, must be regarded as impliedly repealed thereby: see *In re Douglas*, [1905] 1 Ch. 279. "It is a maxim of construction that where the provisions in two Acts of Parliament are clearly inconsistent, then there is of necessity an implied repeal of the inconsistent provisions of the earlier Acts:" *The Queen v. Commissioners of Inland Revenue* (1888), 21 Q.B.D. 569, 577; also Hardcastle's Statute Law, 3rd ed., pp. 330 and 334; Maxwell on Statutes, 3rd ed., p. 214; Endlich on Statutes, secs. 205, 208, and 230.

The argument proceeded on the assumption that the gift was of "land," and I have so far dealt with it in the same way. I think, however, that the gift is not of land, as interpreted by sec. 3 of ch. 112, but is a gift of "personal estate arising from or connected with land," within the meaning sec. 8 of ch. 112, which section reads: "Money charged or secured on land or other personal estate arising from or connected with land, shall not be deemed to be subject to the provisions of the statutes known as the Statutes of Mortmain or of Charitable Uses as respects the will of a person dying on or after the 14th day of April, 1892, or as respects any other grant or gift made after the said date."

The effect of this section is, I think, to enable a testator, as in this case, to devise his lands to his executors to sell and to pay the proceeds to a charity freed from the provisions of the Mortmain Acts, so that it may be given as freely to a charity as pure personalty could always be given.

This is the view taken by Mr. Bristow in his treatise on the English Mortmain Act of 1891, pp. 33-4-5.

In sec. 3 of the English Act, "land" is defined exactly as it is defined in sec. 3 of both the Ontario Acts, namely, "'Land' in this Act shall include tenements and hereditaments, corporeal and incorporeal, of any tenure; but not money secured on land or other personal estate arising from or connected with land" But the English Act of 1891 has not a section corresponding with sec. 8 of ch. 112, above in part quoted.

Two cases in the Court of Appeal in England, not cited upon the argument, are, I think, decisive on this point, namely, .

In re Sidebottom, [1902] 2 Ch. 389, and *In re Ryland*, [1903] 1 Ch. 467.

In the former case, Romer, L.J., at pp. 391-2, says: "In this case land was assured by will to trustees upon a valid and effective trust for sale, and under the will the charity took no interest except in the proceeds of sale. It is not a case where, according to the true construction of the will, land or any 'tenements and hereditaments, corporeal or incorporeal, of any tenure' was given directly to the charity, or to trustees upon trust for the charity. . . . No doubt by this will 'land' was 'assured,' and under the will the charity derived a 'benefit.' But by this will the charity obtained no benefit, except a benefit in the 'personal estate arising from the land' after the testator had affected the land with an effective trust for sale."

As against the right of the charities to take, it was further argued that, notwithstanding the provisions of ch. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least six months before the testator's death by virtue of sub-sec. (6) of sec. 7 of that Act. But *Re Kinny* (1903), 6 O.L.R. 459, is a distinct decision against this contention. The above statute, R.S.O. ch. 112, was based upon the English Act of 1891, and the Ontario statute of 1902 was based upon the English Act of 1888; and in *In re Hume, Forbes v. Hume*, [1895] 1 Ch. 422, it was held that sec. 4 of the Act of 1888, which corresponds with sec. 7 of our Act of 1902, was, so far as it applied to wills, inconsistent with and repealed by sec. 5 of the Act of 1891, which corresponds with sec. 4 of ch. 112, and remains in force only so far as it is applicable to deeds.

The Legislature of Ontario in enacting our statute of 1902 from the English Act of 1888, after having enacted ch. 112, based upon the English Act of 1891, which, as construed by *In re Hume*, had repealed sec. 4 of the Act of 1888, so far as respected wills, presumably had this fact in mind when, in sec. 1 of the Act of 1902, it was provided that the Act should be read as part of ch. 112, R.S.O., and when introducing sec. 7, corresponding to the above sec. 4 of the English Act of 1888,

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by the words "subject to the provisions of the Revised Statutes chapter 112," etc.

The result of this application is, I think, to put our two Acts practically in the same position as the two English Acts stand, as determined by *In re Hume*, and therefore sec. 7 of the Act of 1902 does not apply to wills but only to assurances *inter vivos*. See *Re Kinny*, above cited.

The declaration will, therefore, be in this case, that the gifts to the charities are valid. The costs of all parties to be paid out of the estate.

T.T.R.

[DIVISIONAL COURT.]

TOWNSHIP OF ELMSLEY V. MILLER ET AL.

D. C.
1905April 25.
May 8.*Discovery—Production of Documents—Privilege—Documents Secured in View of Possible Litigation.*

Documents obtained by the solicitors of the plaintiffs to aid them in forming an opinion as to the legal rights of the plaintiffs in reference to a road, about which a dispute with the defendants had arisen, are privileged from production in an action brought as a result of the opinion formed by the solicitors, notwithstanding that an action was not expressly contemplated when the solicitors were instructed to obtain the necessary information and give the opinion.

Leahey v. Halifax Joint Stock Banking Co., [1895] 1 Ch. 686, followed.
Decision of TEETZEL, J., affirmed.

AN appeal by the plaintiffs from an order of a local Judge requiring the plaintiffs to file a further and better affidavit in compliance with the usual order for production of documents, in an action to establish a highway and to restrain the defendants from interfering with its use as such.

The appeal was heard by TEETZEL, J., in Chambers, on the 24th April, 1905.

C. A. Moss, for the plaintiffs, appellants.

Grayson Smith, for the defendants.

April 25. TEETZEL, J.:—The defendants are owners of land through which a roadway runs, and the question to be determined in the action is whether such roadway is a public highway or not.

The defendants claim that it is not a public highway, but that it is their own property, and in assertion of their rights have placed obstructions upon it.

On the 10th June last, some two or three months before the commencement of the action, a number of persons interested in having the road maintained as a public highway, and the defendants, appeared at a meeting of the council of the plaintiff corporation, and, after some discussion, a resolution was passed by the council under which Messrs. Sparham and McCue, solicitors, were authorized and empowered to thoroughly investigate the right of the township to use the road as

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surveyed and set out in a certain by-law passed in 1852, or the present travelled road, being the road in question, and to secure all possible evidence and make all searches they may think necessary, and to report the result of their investigations to the council, and to give their opinion, and if they felt doubtful on any vital question, to obtain advice from a Toronto counsel and report.

Pursuant to this resolution, the solicitors proceeded to obtain information, and secured a number of statutory declarations from different persons respecting the road in question, and upon such information the solicitors, on the 29th October, reported to the council that the road in question, in their opinion, is a public highway, and that the council had jurisdiction over it.

Shortly afterwards this action was commenced against the defendants, in consequence of their resisting the user of the road as a public highway, and the question involved in the appeal is whether these statutory declarations, which in the affidavit on production are claimed as privileged as "being part of the plaintiffs' case and prepared for the instruction of counsel and prepared specially for this litigation and in contemplation thereof, and contain the names of plaintiffs' witnesses and the evidence which such witnesses may give at the trial of this action," should be produced.

There was some evidence of conversations at and after the date of the meeting between the reeve and the township solicitors on the one hand, and the defendants and their solicitors on the other, indicating a willingness at the time for the defendants to join in getting information and that any information obtained would be open to all interested parties. Before the action was commenced, it does not appear that the defendants availed themselves of the privilege either of taking part in getting the information or in inspecting it, and the question now is whether, after action, the defendants are entitled to production and inspection of the written information or evidence obtained before the action by the solicitors for the plaintiffs.

I am of opinion that the defendants are not entitled to such production and inspection. While the information was not

obtained for the purpose of supporting an action expressly contemplated at the time the instructions were given to the solicitors, it must have been contemplated that if the report of the solicitors was that a highway existed, an action would be brought against the defendants for obstructing it, if they persisted in disputing that it was a highway, in which event the information obtained by the solicitors would be necessary to assist them in prosecuting such action.

I do not think it is necessary that at the time the resolution was passed an action should have been actually decided upon in order to disentitle the defendants to claim the privilege now set up.

The immediate purpose of the information was to aid the solicitors in forming an opinion as to the legal rights of the plaintiffs in reference to the road, and I think also such information obtained by the solicitors for that purpose is privileged from production in an action brought as the result of the opinion formed by the solicitors.

In *Southwark Water Co. v. Quick* (1878), 3 Q. B. D. 315, it was held that documents prepared in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged if prepared with a *bona fide* intention of being laid before him for the purpose of taking his advice, and that an inspection of such documents cannot be enforced.

This case was followed in *Learoyd v. Halifax Joint Stock Banking Co.*, [1893] 1 Ch. 686, in which *Wheeler v. Le Marchant* (1881), 17 Ch. D. 675, the leading case cited by Mr. Smith, is discussed. The *Learoyd* case decides that when an examination of witnesses has taken place under sec. 27 of the Bankruptcy Act, 1883, upon the application of a trustee in bankruptcy, and with the view of enabling his solicitor to advise him whether an action should be brought with reference to the bankrupt's affairs, the transcript of the shorthand-writer's notes of the proceedings at such examination is a document entitled to privilege.

I think this case is a clear authority entitling the plaintiffs to the privilege claimed.

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The appeal will therefore be allowed with costs to the successful party in the action.

The defendants appealed from the order of TEETZEL, J., and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and MAGEE, JJ., on the 8th May, 1905.

The same counsel appeared.

THE COURT at the conclusion of the argument dismissed the appeal with costs, agreeing with the reasons given by Teetzel, J.

E. B. B.

[IN THE COURT OF APPEAL.]

TORONTO GENERAL TRUSTS CORPORATION V. CENTRAL
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C. A.
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April 12.

*Pledge—Securities—Railway Bonds—Bank—Power of Sale—Construction—Notice
—Abortive Auction Sale—Subsequent Private Sale.*

As collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and, by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby:"—

Held, reversing the judgment of STREET, J., 7 O.L.R. 660, OSLER, J.A., dissenting, that the power was to sell by auction, and that the bank had no power to sell by private contract.

Semble, that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees.

AN appeal by S. J. Ritchie from the order of Street, J., 7 O.L.R. 660, allowing an appeal by Thomas Gibbs Blackstock and Robert Weddell from a certificate of the local Master at Belleville of his finding that the sale to them by the Bank of Ottawa of certain funds of the defendant railway company was invalid.

The appeal was heard by OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 5th December, 1904.

A. B. Aylesworth, K.C., for the appellant. By the instrument of pledge the bank were authorized, in default of payment, to sell the bonds "by giving fifteen days' notice." The word "by" is apt; it means "on." It was incumbent on the pledgees to sell on notice to the public as well as to the pledgor, and by auction. The respondents had personal knowledge at the time they bought of the bank's position and powers, and certainly had knowledge through their solicitor. Having notice, they are in no better position than the bank.

J. H. Moss, on the same side. The pledgee must give notice of the time and place of the sale: *Stearns v. Marsh* (1847), 4 Denio 227; *Bryan v. Baldwin* (1873), 52 N.Y. 232; *Cushman v. Hayes* (1867), 46 Ill. 145; *Davis v. Funk* (1861), 39 Pa. St. 243; Schouler on Bailments and Carriers, 3rd ed., sec. 228.

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Unless the parties agree expressly that a private sale is permissible, the sale must be at public auction: Schouler, sec. 230; Story on Bailments, 9th ed., p. 277, note 3; *Strong v. National Mechanics Banking Ass'n.* (1871), 45 N.Y. 718, 720; Jones on Collateral Securities, 2nd ed., pp. 772, 776. The notice here was not a notice that the bank would sell by public auction and in default by private sale. Securities such as these are negotiable: *Edelstein v. Schuler*, [1902] 2 K.B. 144; *Bechuana-land Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 658. Being like promissory notes, the holder of them can give no better title after maturity than he himself has—notice or no notice: Maclaren on Bills of Exchange, 3rd ed., p. 214; sec. 36 of Bills of Exchange Act, sub-sec. 2; *West v. MacInnes* (1864), 23 U.C.R. 357; Chalmers on Bills of Exchange, 6th ed., p. 118; Colebrooke on Collateral Securities, 2nd ed., p. 82.

G. T. Blackstock, K.C., for the respondents. The bank were not called upon to sell by public auction. Under the Bank Act, they could make a private sale, and there was nothing in the contract of pledge to take away that right. The respondents believed the bank to be the owners of the bonds; it was not an extraordinary thing that they should so believe. It is doubtful whether the doctrine of constructive notice applies to commercial transactions. There is no ground for applying that doctrine here. It was not necessary to make any inquiry at all. If inquiry had been made, the inquirer would have found the hypothecation document and the fact that there had been an attempted sale by auction with a good notice. The bonds were negotiable securities, and a good title passed upon delivery: *Young v. MacNider* (1895), 25 S.C.R. 272.

T. P. Galt, on the same side. The bank followed the practice adopted in the case of mortgage sales. I refer to *Prideaux's* Precedents in Conveyancing, 14th ed., p. 539; Ashburner on Mortgages, p. 64; *Metters v. Brown* (1863), 33 L.J.N.S. Ch. 97; *Bousfield v. Hodges* (1863), 33 Beav. 90; *Drifill v. McFall* (1877), 41 U.C.R. 313; secs. 65, 66, 78, of the Bank Act.

Aylesworth, in reply, referred to Maclaren on Bills of Exchange, 2nd ed., p. 137: *Deverges v. Sandeman*, [1902] 1 Ch. 579.

APRIL 12. MACLENNAN, J.A. :—The question in this appeal arose in the Master's office in Belleville, and is, which of the parties is entitled to prove in respect of 300 bonds issued by the railway company for the sum of \$1,000 each, with interest coupons attached, which had been pledged by Ritchie to the Bank of Ottawa, as security for a promissory note of \$50,000 made by him, bearing date the 30th November, 1900, and payable fifteen days after date, with interest at six per cent. per annum from the 31st May preceding.

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Blackstock and Weddell claim to have purchased the bonds from the bank, after default in payment of the note, at the rate of 22½ cents in the dollar of the principal money of the bonds, and to have paid the purchase money therefor, amounting to \$67,500. Ritchie, on the other hand, claims that the bank having held the bonds in pledge by way of security, the sale made by them was irregular and void, and that the purchasers, having bought with notice of the character in which the bank held the bonds, are affected by the invalidity of the sale.

The learned Master found for the appellant Ritchie, and his judgment was reversed on appeal by Mr. Justice Street, from whose judgment the present appeal is brought.

Having read carefully the whole of the lengthy evidence and documents, I think the Master came to the proper conclusion on the question of notice, that is, that the respondents had notice before completion that the bank held the bonds as pledgees and not as owners, and the only doubtful question is as to the regularity and validity of the sale.

That question depends on the proper construction of the contract of pledge, which is set out in the Master's judgment.

The contract authorizes the bank, in default of payment of the note at maturity, "from time to time" to sell the said securities or any part thereof . . . by giving fifteen days' notice in one daily paper published in the city of Ottawa, as to the said bank shall seem proper, with power to the bank to buy in and resell without being liable for loss occasioned thereby."

The bank published a notice of a sale of the bonds by auction on the 11th March, 1902, and it was published in the *Ottawa Evening Journal* daily for fifteen days before the day of

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sale. There was no sale at the time appointed, and it was postponed for one week, the advertisement, with a notice of the postponement, having been continued. Neither on this occasion was there any sale made of the bonds, and it was further postponed for another week, but without any further publication of the notice of sale, and no sale was effected.

There was no further publication of any intention to sell the bonds, and on the 19th August an offer was received by the bank from Mr. Blackstock, one of the respondents, of 22½ cents in the dollar on the par value of the principal money of the bonds, and after much correspondence a sale of the whole of the bonds, with unpaid coupons attached, was made to Mr. Blackstock, on behalf of himself and the other respondent, and completed on or about the 30th September.

At the time of the sale the par value of the bonds, with interest coupons in arrear, was, as found by the Master, about \$660,000; the debt due to the bank was \$56,872.78; and the purchase money received was \$67,500, or \$10,627.22 more than was due. So that the bank sold nearly five bonds, with attached coupons, the par value of which was \$11,000 more than was necessary to pay their debt, no effort having been made to restrict the sale to so many as was necessary for that purpose.

On receiving Blackstock's offer of the 19th August, the bank telegraphed to Ritchie at Akron, Ohio, where he lived, that they had an offer for the bonds, not stating what it was, and that they would sell unless payment was made by twelve o'clock on the 21st. To this they received an answer on the same day, that arrangements were being made to pay the debt, and protesting against the sale. No further communication was made to Ritchie, and the fact of the sale was apparently not made known to him until the 21st October afterwards.

The learned Master was of opinion that the sale to the respondents by private contract, without any further notice, as required by the instrument of pledge, was unauthorized and void, but in this he was reversed by the judgment of Mr. Justice Street, from which Mr. Ritchie has brought this appeal.

The bonds in question are part of a series of 2,200 for \$1,000 each, with interest at six per cent., payable half-yearly, secured by a mortgage of the railway made by trustees. The

bonds were payable at the end of 20 years, and became due on the 2nd April, 1902. Both bonds and interest coupons are expressly made payable to bearer, and it is declared that each bond and all rights and benefits arising therefrom shall pass by delivery. Under these circumstances, I think the bonds and coupons are negotiable securities, and that, in the absence of notice that the bank held them as security, or that Ritchie had some title or interest therein, the respondents' title would be good: *Young v. MacNider*, 25 S.C.R. 272, and the cases there referred to by Strong, C.J.; and the question is whether the sale is binding on Ritchie, and I think it is not.

The bank were pledgees for a debt, payable at a fixed time, which had elapsed. Therefore, no demand of payment was necessary, and the bank had a power to sell as provided in the instrument of pledge. The pledge was of the bonds and all coupons attached thereto. The notice of sale seems to be as meagre and slipshod a compliance with the contract as could well be imagined. It describes the bonds as bearing five per cent. interest, instead of six per cent. per annum, and states that to each bond all *maturing* coupons are attached. The bonds were dated on the 1st April, 1882, and became due on the 2nd April, 1902, and so on the day named for the sale there was only one coupon *maturing* on each bond. There were nearly 40 overdue coupons on each bond, representing a debt exceeding the whole amount of the principal money, which were not advertised to be sold at all. The bonds were a part of a series of 2,200 for \$1,000 each, the whole with interest secured *pari passu* by mortgage of the railway and all its works, and the advertisement is silent as to there being any security. It is not said how the bonds would be offered, whether en bloc or in parcels, nor does the evidence disclose how they were offered. All that is said is, by Mr. Burn, that there were no bids, and by Mr. Langdon that on the last adjournment, on the 25th March, the sale was closed, there being no bidders thereat, and the sale proved abortive. After the failure to sell on the 18th March the bank informed Mr. Ritchie by letter and telegram of the further postponement of the sale to the 25th, that there had been considerable inquiry for the bonds, and that it was probable there would be no lack of purchasers when they were finally

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exposed for sale, but, as already observed, there was no further advertisement of this final postponement, or, so far as appears, any other effort to reach those inquirers or expected purchasers, or any notice except to Ritchie.

I am unable to construe the power of sale in the same manner as Mr. Justice Street. He thinks a sale *by* giving fifteen days' notice must be taken to mean to sell "after giving" or "first giving," or simply "giving," the required length of notice. He says the giving of the notice was a condition to be performed, in the absence of which no authority to sell arose, that the stipulation did not require a sale by auction, and therefore the bank were entitled under it to sell either by private sale or by public auction. I cannot adopt that view of the power, because it eliminates from the contract the word *by*, which we are not at liberty to do. The fifteen days' published notice was the means agreed upon for effecting the sale. The notice was published, but it effected nothing. The bonds were still unsold, and it is not pretended that the sale to the respondents was effected by the notice. The notice was of a sale by auction, and I think that is what the contract intended. That is apparent from the power given to the bank to buy in and resell, and I think the bank had no power to sell otherwise than by auction. The sale in question was made by private contract, and I think the bank had no power to do that.

But even if, after the sale by auction in pursuance of the published notice had failed, it could be held that then the bank had power to sell without a further advertisement, I think this sale cannot and ought not to be upheld as a valid sale of these pledged bonds. In Story on Bailments, 9th ed., sec. 310, a work which ever since its first publication in 1839, has been cited in England as an authority, it is said: "The common law of England, existing in the time of Glanville, seems to have required a judicial process to justify a sale, or at least to destroy the right of redemption. But the law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale; or, he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor. In the latter case, if the sale

is *bona fide* and reasonably made, it will be equally as obligatory as in the first case. But a judicial sale is most advisable in cases of pledges of large value, as the Courts watch any other sale with uncommon jealousy and vigilance; and any irregularity may bring its validity into question."

There is very little authority that I have found in the English books as to whether, or when, a sale of a pledge by private contract may be made, but in the United States the authorities are numerous and uniform that it should be public, so as to ensure the best price being obtained: Schouler on Bailments, 3rd ed., secs. 227, 228, 229; Lawson on Bailments (1895), sec. 62; and see 22 Am. & Eng. Encyc. of Law, 2nd ed., pp. 882-891,

I think this sale was not made with reasonable care or with proper or any regard to the rights and interests of Ritchie. No attempt had been made to reach the inquirers referred to in Mr. Burn's letter of the 18th March, and who were expected at that time to become purchasers, and when the offer of the 19th August came, its terms were not communicated to Ritchie, but he was called upon to redeem within 48 hours, or in default it would be accepted. That offer was about 10 $\frac{1}{2}$ cents in the dollar of the bonds and arrears of interest which were sold. The very first offer was accepted, because it was sufficient to pay the bank's debt, although they knew there were other inquirers for the bonds, who, as they had reason to believe and expect, might become purchasers. They also carelessly sold more than were necessary to pay their debt, without any effort to restrict the sale to what was sufficient for the purpose, and although the offer was at so much in the dollar, and not a fixed sum for the whole, I think such a sale, even if the bank had power to sell by private contract, and which I think they had not, cannot be supported as between the bank and Ritchie, and by reason of notice to the respondents cannot be maintained by them any more than it could be by the bank.

I therefore think the appeal should be allowed, and that the decision of the Master should be restored.

GARROW and MACLAREN, J.J.A., concurred.

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OSLER, J.A.:—This was an issue tried by the Master under the authority of the judgment in the action as to the ownership of a number of bonds of the Central Ontario Railway Company in possession of the respondents Blackstock and Weddell.

The appellant Ritchie insisted that he was the owner and entitled to prove thereon in the Master's office, subject to the lien of the Ottawa Bank, to whom he had pledged them for advances, by an instrument of hypothecation dated the 30th November, 1900. The bonds were then unregistered, and did not fall due until the 2nd April, 1902.

The respondents' contention was that they were themselves the absolute owners of the bonds, having purchased them from the bank under the power of sale contained in the pledge; or, in the alternative, that they were holders for value from the bank, without notice of any defect in the latter's title, of negotiable instruments payable to bearer, and transferable by delivery, which these bonds undoubtedly were: *Edelstein v. Schuler*, [1902] 2 K.B. 144; *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 2 Q.B. 658; *Young v. MacNider*, 25 S.C.R. 272, 278. If the respondents were driven to rely upon the latter title, and were unable to support the sale as a valid sale under the special authority of the pledge, the appellant's case was that this title was also defective, inasmuch as the respondents had notice of the pledge, and of the terms on which alone the bank were entitled to sell.

As the right of the bank as between themselves and the appellant to sell the bonds is defined by the written terms of the pledge under which they acquired possession of them, it is needless to consider the arguments addressed to us on the subject of the pledgees' right of sale and the mode in which it should be exercised at common law or under secs. 65 and 66 (1) of the Bank Act. Section 66 (2) provides that the latter right may be waived or varied by any agreement between the bank and the owner of the bonds, and that has been done.

The document which accompanied the deposit of the bonds is not well framed, and it cannot be said that any view which may be taken of it is quite free from doubt. I have considered it with some care, and in the result I incline to the opinion of my learned brother Street. The power to the bank to buy in

and re-sell seems to contemplate a sale by auction, but I do not think that is very material as aiding in the construction.

The language of the instrument is: "On default of paying this note at maturity, we authorize the bank from time to time to sell the said securities or any part thereof by giving 15 days' notice in one daily paper published in the city of Ottawa as to the bank shall seem proper, with power to the bank to buy in and re-sell without being liable for loss," etc.

Does this mean that 15 days' notice is to be given of any and every intended sale or attempt to sell, as the appellant contends, so that no sale can be made unless 15 days' notice has been given of it, and, if no sale is made on the expiration of that notice, that another 15 days' notice must be given and so on from time to time? Or is the reasonable construction this: that the pledgees having first given 15 days' notice of the intention to sell, whether by auction or otherwise, at the end of or after that time, if their debt has not been paid, may sell from time to time thereafter without further notice, by private sale or public auction as to them shall seem proper?

The latter is, I think, the true meaning of the instrument, and any other would be needlessly onerous and not compelled by its terms. The idea is, that the pledgees having given 15 days' notice of their intention to sell if their debt was not paid, they have placed themselves in a position to sell thereafter from time to time, and that no further notice shall be necessary. Having given this notice, I would hold with Street, J., that the sale is valid, and that the respondents and not the appellant are entitled to prove as holders of the bonds.

I must add that I do not regret that my learned brothers have been able to arrive at a different conclusion, for a more improvident sale on the part of the bank, in the absence of any explanation on their part, and they are not before us, is not easy to conceive of.

The appeal should be dismissed.

Appeal allowed; OSLER, J.A., dissenting.

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May 16.

IN RE SAULT STE. MARIE PROVINCIAL ELECTION, 1903.

GALVIN AND COYNE CASES.

Parliamentary Elections—Corrupt Practices—American Citizens—Tort Committed within Province—Service out of Jurisdiction—R.S.O. 1897, ch. 9, secs. 162, 166, 188, sub-sec. 5—Con. Rule 162 (e)—Election Court Rule LXIV.

American citizens having intervened in the conduct of provincial elections, and having committed illegal and corrupt acts in the Province in connection therewith:—

Held, that their foreign nationality or residence did not exempt them from the penal consequences of their violations of the Election Act, R.S.O. 1897, ch. 9.

Held, also, that they had been properly served outside the jurisdiction under Con. Rule 162 (e) made applicable to proceedings in Election Courts by Rule LXIV., passed December 23rd, 1903.

Held, further, that transportation by public steamboat does not come within the words "hire a horse, cab, cart, waggon, sleigh, carriage, or other conveyance . . . for the . . . transportation of voters," in sec. 165 of the Ontario Election Act, R.S.O. 1897, ch. 9, making illegal the hiring of such vehicles by candidates to convey electors to or from the polls.

AFTER the trial of a petition against the election of a member for the Ontario Legislative Assembly for the electoral district of Sault Ste. Marie, (which election took place on October 20th and 27th, 1903, and the trial on September 13th-17th, 1904,) summonses were issued under the Ontario Controverted Election Act and amending Acts, calling upon Patrick Galvin of Sault Ste. Marie, Michigan, one of the United States of America, and William Coyne described as formerly of Sault Ste. Marie, in the electoral district of Nipissing, to appear at the court house in the town of Sault Ste. Marie, before Boyd, C., and Teetzel, J., the Judges who tried the petition, to answer charges that they were respectively guilty of corrupt practices at the election, in that they did cause a certain steamer named *Minnie M.* to be used free of charge to convey impersonators and proposed voters from Sault Ste. Marie to Michipicoten Harbour and the Helen Mine, there to vote for C. N. Smith a candidate at the election, such free transportation being contrary to sec. 166 of the Ontario Election Act, R. S. O. 1897, ch. 9, and did furnish meat, drink and refreshment to the impersonators and voters, and were

otherwise guilty of corrupt practices in respect of them, and to shew cause why they should not be imprisoned for the terms set under the different sections of the said Act relating to such corrupt practices, and pay the costs of this application and of the hearing and orders to be made thereon, and further to be dealt with according to any of the provisions of the Ontario Election Act and amending Acts and the common law in that behalf relating to the said charges.

The matter came on for hearing at Sault Ste. Marie on January 24th, 1905, and was completed at Toronto on February 4th, 1905.

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R. McKay and *W. M. McKay*, for defendants, urged that there was no jurisdiction to allow service of the summons at Wilmington, Illinois; that the jurisdiction did not extend to a United States citizen, or to service on him in the United States: *In re Eager*, *Eager v. Johnstone* (1882), 22 Ch. D. 86; *Ex parte Brandon* (1886), 54 L.T. N.S. 128; *In re Anglo-African Steamship Company* (1886), 32 Ch. D. 348; *In re Jellard* (1888), 39 Ch. D. 424; *In re La Compagnie Générale d'Eaux Minérales et de Bains de Mer*, [1891] 3 Ch. 451; *Re Guy v. Grand Trunk R.W. Co.* (1884), 10 P.R. 372; *Ontario Glass Company v. Swartz* (1882), 9 P.R. 252; *McLeod v. Atty.-Gen. for New South Wales*, [1891] A. C. 455; *Hewitson and Milner v. Fabré* (1888), 21 Q. B. D. 6; *Deacon v. Chadwick* (1901), 1 O.L.R. 346; *Sirdar Gurdial Singh v. The Rajah of Faridkote*, [1894] A.C. 670.

E. E. A. DuVernet, for the Crown, referred to Con. Rule 162. sub-secs. (c), (e); Rule LXIV. of the General Rules respecting the trial of Election Petition*; and contended that there was jurisdiction, as the tort was committed in Canada.

McKay, in reply, contended that the High Court Rules had no application.

May 16. BOYD, C.:—The preliminary objection as to want of jurisdiction ought not to prevail. These persons, Coyne and

*Rule LXIV. : So far as conveniently may be, and so far as they are not inconsistent with these rules, the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario shall apply to all proceedings upon an election petition under The Controverted Elections Act.

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Galvin, claiming to be American citizens, have thought proper to intervene in the conduct of the Sault Ste. Marie Provincial Election, and have been proved to have committed illegal and corrupt acts in connection therewith. The fact of foreign nationality or residence is the only matter which can be urged to exempt them from the penal consequences of their violations of the statute.

But they have attorned to the jurisdiction of the Ontario court by promoting and committing unlawful acts affecting the public election which were consummated within the territorial boundary of the Province.

We are satisfied that both objectors are aware of this summons, and might have been present in person had they so desired, and we are empowered to pronounce judgment in their absence: R.S.O. 1897, ch. 9, sec. 188, sub-sec. 5.

Each summons was personally served on these persons when out of the jurisdiction, and the complaint is as to torts or violations of the Ontario Election Act committed within the jurisdiction of the Province.

It was argued that there was no rule or practice permitting service in such cases outside of Ontario. Con. Rule 162 (e) applies to a tort within the jurisdiction, and this rule is made applicable to proceedings in the Election Courts by Rule LXIV., passed December 23rd, 1903, by the Judges of the Court of Appeal for Ontario, under the authority conferred by R.S.O. 1897, ch. 11, secs. 112, 113.

As to Patrick Galvin, we find it proved that he provided meat, drink and refreshment to voters while going to, staying in, and returning from the polls within the jurisdiction of the court, in going to Michipicoten Harbour and Helen Mine and returning therefrom on October 26th, 27th, and 28th, 1903, contrary to the provisions of sec. 162 of the Election Act, R.S.O. 1897, ch. 9.

And we further find Galvin guilty of having aided and abetted, counselled and procured the commission of the offence of personation of voters, contrary to the provisions of sec. 167 of the said Election Act, and that he did induce and procure persons to vote at the said election in the summons mentioned, knowing that they had no right so to vote. For this offence we impose

a penalty of \$100. For the former offence we impose a penalty of \$200. See sec. 162 (1), and sec. 188 (7).

The costs of and incidental to this prosecution to be paid after taxation by the said Galvin.

The prosecutor electing to recover these amounts by process sued out of the High Court, we do hereby order the payment thereof forthwith by the said Galvin.

As to William Coyne, we find it proved that he provided free transportation for voters on the railroad from Michipicoten Harbour to Wa Wa and return, transportation on the said railway free of charge, and we impose therefor on him the penalty of \$100, pursuant to sec. 165 of the Election Act, and costs of prosecution.

We find it proved that the said Coyne provided for the giving of meat, drink, refreshment, and provisions in a miscellaneous manner to voters during the election in the summons mentioned for the purpose of influencing persons to vote at the said election, and we therefore impose on him the penalty of \$200 with all costs of and incidental to this prosecution. These sums as the prosecutor elects to be recovered, as in the case of Galvin.

We do not find that any penalty can be imposed for the free transportation provided by the said Coyne by means of the steamer *Minnie M.* The statute contemplates transportation by railway on the land and not by steamboat on the water. "Railway, cab, cart, waggon, sleigh, carriage or other conveyance," are the words used, and on the principle of *noscitur a sociis* we do not think that the last larger word "conveyance" can in a criminal proceeding be so enlarged by construction and having regard to the authorities as to take in a steam vessel propelled on the water. See sec. 165 (1), (2), (3) of the Election Act, R.S.O. 1897, ch. 9.

TEETZEL, J., concurred.

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McNIROY V. TOWN OF BRACEBRIDGE.

June 8.

Way—Non-repair of Highway—Injury to Pedestrian—Sidewalk—Negligence—Supervision—Notice.

In an action for damages for injuries sustained by the plaintiff from a fall upon a sidewalk in a town, it appeared that the defect in the sidewalk was slight in character—not conspicuous or notorious—on a street comparatively little frequented, over which there was weekly supervision, and that the defect had not existed more than six days before the plaintiff was hurt, was not actually noticed by any officer of the municipality, and that no complaint was lodged :—

Held, that notice of the condition of the sidewalk was not to be attributed to the municipality.

ACTION to recover damages for injuries sustained by the plaintiff by a fall upon a sidewalk in the town of Bracebridge, alleged to have been out of repair. The facts appear in the judgment.

The action was tried before BOYD, C., without a jury, at Bracebridge, on the 30th May, 1905.

O. M. Arnold, for the plaintiff.

T. E. Godson, for the defendants.

June 8. BOYD, C.:—In *Durochie v. Town of Cornwall* (1893), 23 O.R. 355,* relied on by the plaintiff, the injury occurred in the principal and most frequented street in Cornwall, and in the busiest portion of the town, and the place of defect had been in as bad a condition for over a week as at the time of the mishap : p. 358. Much complaint had also been made to the corporation about the bad condition of the thoroughfare before the accident took place.

Here the state of facts is very different. The street in question is somewhat frequented by workmen, but it is not proved to be a very important street of Bracebridge, and those who frequented it did not consider it in a dangerous state ; no complaint was made at any time, and in fact the break in the plank where the plaintiff stumbled had not existed longer than

*Affirmed 21 A.R. 279, 24 S.C.R. 301.

6 days, if as long. The plaintiff had passed over the walk in the morning, and had noticed the broken plank, which caused an angular depression, at the deepest not over 2 inches, at which spot she fell in the evening (according to her evidence) and lamed herself.

Ferrier, the supervisor of the sidewalks, was upon the street inspecting the walk on the 9th or 10th November, and found it in fairly good condition—better than most in the town; the plank was “not quite sound nor altogether rotten” in the middle; rested on good sills and was strong enough to carry a heavy man. The plank was not then broken or he would have repaired it. The condition of the sills as being good and sound is confirmed by the town engineer. The walk had been then down for 4 or 5 years, but on all the evidence it was not in a state of obvious decay. The plaintiff’s son says he went over the broken plank 4 times a day, and saw it so several days before the accident happened, but did not think it dangerous. He says he noticed it more than 6 days before, and did not consider it safe.

Having regard to the supervisor’s evidence, who fixes the date of his visit by the time when he left the employment of the town on the 11th November, I do not think that the break existed more than 6 days before the plaintiff was hurt. Taking it, then, that this condition of disrepair existed 6 days before on the particular street, and was not actually noticed by any of the officials or members of the municipality, and that no notice or complaint as to its state was lodged with them, can it as a matter of law be inferred that the corporation had notice of the breakage and delayed to make repairs for an unreasonable time? This matter is somewhat discussed by the Court of Appeal in *Rice v. Town of Whitby* (1898), 25 A.R. 191, 200, where it is laid down that where there is no actual notice, the inferring of such notice after the lapse of a reasonable time dating from the origin of the defect, is proper and permissible; but the question as to the length of time sufficient to raise such inference depends altogether on the circumstances of the case and varies accordingly.

Upon the state of facts I have detailed, I cannot bring myself to hold that sufficient notice of the condition of the walk

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has been brought home to or is to be attributed to the municipality.

This defect was slight in character—not conspicuous or notorious—on a street comparatively little frequented and one over which there was periodical supervision (apparently weekly). Altogether I think there was reasonable vigilance on the part of the town in looking after the state of this particular walk, and that the defect which existed ought not to be charged against the corporation as an act of negligence.

I have consulted cases in many American States in which the conditions and the law are similar to ours, and the general trend of decision is conformable to the conclusion I have reached. I may specially refer to *City of Murphysboro v. O'Riley* (1890), 36 Ill. App. 157, 160; *City of Bloomington v. Annett* (1884), 16 Ill. App. 199; *Foels v. Tonawanda* (1894), 75 Hun 363; and *Baxter v. City of Cedar Rapids* (1897), 103 Iowa 599.

This being my conclusion, it follows that the action fails. Costs should not be asked.

E.B.B.

[IN THE COURT OF APPEAL.]

HOCKLEY v. GRAND TRUNK R.W. Co.

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June 2.

Damages—Reduction—Consent—New Trial—Rule 786—Quantum of Damages.

The Court of Appeal pronounced judgment on the 4th April, 1905, dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction.

The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and, acting under Rule 786, directed a new trial confined to the question of the amount of damages.

Held, following *Watt v. Watt*, [1905] A.C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

THIS was an action brought by Mary Ann Hockley, on behalf of herself and child, to recover damages for the death of her husband from injuries received by reason of the negligence of the defendants, as she alleged.

At the first trial there was a nonsuit, which was set aside and a new trial ordered by a Divisional Court, whose order was affirmed by the Court of Appeal and the Supreme Court of Canada.

The second trial resulted in a verdict and judgment for the plaintiff for \$5,000. The defendants appealed to the Court of Appeal, and judgment was given on the 4th April, 1905, against the defendants except as to the *quantum* of damages. Upon that question the judgment pronounced by the Court was as follows: "We think there should be a new trial unless the plaintiff Mary Ann Hockley consents to reduce the judgment to \$4,000, apportioned as follows; \$2,800 to her and \$1,200 to her infant son. If she accepts the latter alternative, the appeal will be dismissed with costs. If she declines, there will be a new trial—the costs of the former trial to be costs in the action, the costs of the appeal to be costs to the defendants in any event."

The certificate of this judgment not having issued, *W. R. Riddell*, K.C., for the defendants, on the 20th May, 1905, moved before *MOSS*, C.J.O., *OSLER*, *MACLENNAN*, *GARROW*, and *MACLAREN*, J.J.A., to vary the minutes by directing that there should be a new trial generally, in view of the decision of the House of

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Lords on the 3rd April, 1905, in *Watt v. Watt*, 21 Times L.R. 386.

J. W. McCullough, for the plaintiff, asked that the appeal should be dismissed, expressing willingness to accept \$4,000.

June 2. Moss, C.J.O.:—On the 4th April last we gave judgment herein directing a new trial unless the plaintiff consented to reduce the judgment recovered at the trial to the sum of \$4,000.

On the 3rd April last the House of Lords delivered judgment in a case of *Watt v. Watt*, now reported in [1905] A.C. 115. The holding is adverse to the practice which has been very commonly followed ever since the decision of the Court of Appeal in England in *Belt v. Lawes* (1884), 12 Q.B.D. 356, in cases where the appellate Court has been of the opinion that the damages were excessive.

The report of the decision in *Watt v. Watt*, in 21 Times L.R. 386, came to hand before the issue of the certificate of judgment in this case, and on the 20th May counsel spoke to the question of the form in which the certificate should now issue, the defendants asking that a new trial generally be directed, the plaintiff submitting that the appeal should be dismissed, at the same time expressing willingness to accept the reduced judgment.

For reasons already stated, we are satisfied with the findings and judgment in every respect save in the matter of the *quantum* of damages. That being so, we think that, having regard to Con. Rule 786*, and the well established practice (see also Con. Rule 785), we should direct a new trial confined to the question of *quantum* of damages only.

The certificate will issue in the form appropriate to give effect to this direction. The costs of the last trial and of the appeal will be costs to the plaintiff in any event.

OSLER, J.A.:—Judgment was delivered in this case on the 4th April last directing a new trial unless the plaintiff consented

* 786. A new trial may be ordered on any question in an action, whatever be the grounds for a new trial, without interfering with the finding or decision upon any other question.

within a time specified to a reduction of the verdict to the sum of \$4,000, the Court being of opinion that the damages as found by the jury were excessive. On the previous day, as now appears from the report of the case, the House of Lords delivered judgment in the case of *Watt v. Watt*, [1905] A.C. 115, an action of libel, reversing the judgment of the Court of Appeal by which an order for a new trial was granted unless the plaintiff would consent to the damages as assessed by the jury being reduced to £1,500. The plaintiff consented, but the defendant insisted that her right was to have the damages assessed by a jury upon a new trial. The House of Lords gave effect to her contention, and held that the practice which had prevailed for just 21 years, or ever since the decision of the Court of Appeal in *Belt v. Lawes* (1884), 12 Q.B.D. 356, was wrong, and that the Court had no jurisdiction, without the defendant's consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages.

In this Province a practice similar to that approved in *Belt v. Lawes* has also prevailed, I think I may say without question, ever since that decision: see *Hoover v. Craig* (1885), 12 A.R. 72, 79. The order in the present case not having been issued, Mr. Riddell, for the defendants, now moves that our judgment may be varied so as to direct a new trial absolutely, his clients being unwilling to consent to a reduction of the damages, and preferring to take their chances before another jury.

The question involved not being a mere point of practice, but one of the jurisdiction of the Court in a system of jurisprudence substantially similar to that of the English Courts under the Judicature Acts, it seems to me that, even if not technically bound to do so, we ought to follow the decision of the House of Lords, as we may suppose that the Judicial Committee of the Privy Council, were the question raised before them on appeal from this Court, would probably do, and this not the less readily because the reasoning of the highest English tribunal is conclusively opposed to the principle of the decision which it overruled. It becomes, however, necessary under the circumstances to reconsider the terms on which a new trial should be granted, as that is not now to depend upon the consent of the plaintiff.

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The case has been twice tried. At the first trial the plaintiff was nonsuited, on the ground that there was no evidence of negligence proper to be submitted to the jury. A Divisional Court was of a different opinion, and sent the case back for a new trial. The defendants appealed to this Court, which affirmed the judgment of the Divisional Court, and again with equal want of success to the Supreme Court. On the second trial the plaintiff made even a stronger case than before on the point of negligence, and on the argument of the defendants' third appeal they hardly, if at all, contested that question, confining the stress of the argument to the question of damages. I think that the issue of negligence ought now to be taken as concluded, and should not be tried before another jury, and that, acting upon the authority of Rule 786, the new trial should be ordered only as to the question of damages, not interfering with the findings upon the questions of negligence, and leaving those findings to stand.*

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

* On the third trial (September, 1905), the plaintiff had a verdict for \$4,000.

E. B. B.

[IN CHAMBERS.]

MUIR ET AL. V. GUINANE.

1905

Dismissal of Action—Default of Plaintiff—Application for Relief—Service on Defendant's Solicitor—Duration of Retainer—Jurisdiction of Master in Chambers—Solicitor's Slip—Statute of Limitations.

Feb. 20.
June 6.

Wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358, and so long as that Rule can be invoked the action is still pending, and the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The Master in Chambers has jurisdiction under Rule 358 to set aside an order dismissing the action for default of compliance with an order for security for costs.

Where, owing to the neglect or forgetfulness of the plaintiff's solicitor, security for costs was not furnished within the time allowed, and the defendant obtained an *ex parte* order dismissing the action, the plaintiffs were allowed, upon terms, to give security and proceed with the action, it appearing that the Statute of Limitations would be a bar to a new action.

ON the 20th December, 1904, the usual præcipe order for security for costs was taken out and served.

Owing to a change in the firm of the plaintiffs' solicitors, the order was not complied with; and on the 18th January, 1905, an order was issued, on the *ex parte* application of the defendant under Rule 1203, dismissing the action with costs; but no judgment was entered or costs taxed.

On the 23rd January this order came to the knowledge of the plaintiffs' solicitors; they at once moved under Rule 358 to set aside the order dismissing the action and for leave to put in security and proceed with the action.

Notice of this motion was served on the defendant's solicitor (as appeared by admission indorsed thereon). But on the return of the motion before the Master in Chambers on the 28th January, the solicitor stated that the defendant had been informed by him that the action had been dismissed, and that the defendant had left the Province, without giving any address; and that he (the solicitor) did not consider himself any longer entitled to act.

The motion was adjourned to consider what was the proper course in these circumstances.

Further argument was heard on the 16th February, 1905.

A. R. Clute, for the plaintiffs.

S. B. Woods, for the defendant's solicitor.

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February 20. THE MASTER IN CHAMBERS:—The whole matter was discussed in *De la Pole v. Dick* (1885), 29 Ch. D. 351. It was there thought to be doubtful how long the solicitor on the record continued to represent the client, under the English Rule corresponding to our Rule 335.*

In 1893 the point again came up in *The Queen v. Justices of Oxfordshire*, [1893] 2 Q.B. 149, in which, as in *De la Pole v. Dick* (*supra*), Lord Bowen took part. It was there held unanimously that the retainer did not continue after the order had been made in that case. The decision seems to have been based on the ground that it was not a matter in the High Court, and therefore even the English Rule, as it then stood, did not apply. This had been amended in 1885 by the addition of the words "until the final conclusion of the cause or matter, whether in the High Court or in the Court of Appeal." But no such amendment has been made to our Rule.

The point so far as can be ascertained is new. No authority was cited on either side beyond what is said in *Holmsted & Langton's Judicature Act*, in the notes on Rule 335 (see pp. 515-516).

It was argued that the application under Rule 358† is really an appeal. This seems to be correct. So that the point for decision is just what was raised in *De la Pole v. Dick*, where the head-note reads: "Whether the solicitors on the record do not continue to represent their client until the expiration of the time allowed for appealing, *quære*."

On this Lord Bowen said (p. 357): "It is not necessary in the present case to decide that point."

The inclination was apparently to answer the query affirmatively, and I think it may be said that wherever a

* 335. A party suing or defending by a solicitor shall not be at liberty to change his solicitor in any action or matter without an order, which may be obtained on *præcipe*; and until such order is obtained and served, the former solicitor shall be considered the solicitor of the party.

† 358. A party affected by an *ex parte* order, or any party who has failed to appear on an application through accident, or mistake, or insufficient notice of the application, may move to rescind or vary the order before the Judge or officer who made the same, or any Judge or officer having jurisdiction, within four days from the time when the order comes to his notice, or within such further time as the Court or a Judge may allow, and whether the order has been acted upon by the party issuing it or not.

judgment has been entered on default of either party, a possible remedy is provided by Rule 358; and that, so long as that Rule can be invoked, the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending—otherwise no motion could be made—and the only remedy would be by petition, if any remedy existed.

Then it follows that if the action is pending, the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The motion will therefore now be heard on the merits, as soon as the defendant can be heard from by his solicitor.

The motion was renewed on the 20th May, 1905.

The same counsel appeared.

June 6. **THE MASTER IN CHAMBERS:**—It was admitted that if a new action had to be brought, the Statute of Limitations would be a bar to the plaintiffs' claim.

The only reason given for the failure to comply with the order for security for costs is the forgetfulness of the solicitor.

For the motion reliance was placed on *Dunn v. McLean* (1874), 6 P.R. 156, and the observations of Strong, V.-C., at p. 157; *Collinson v. Jeffery*, [1896] 1 Ch. 644; *Bank of Hamilton v. Anderson* (1904), 4 O.W.R. 146.

Against the motion were cited the observations of Kay, L.J., in *Hewett v. Barr*, [1891] 1 Q.B. 98; *Script Phonography Co. v. Gregg* (1890), 59 L.J. Ch. 406; *Gilder v. Morrison* (1882), 30 W.R. 815.

It was also argued that the Master in Chambers had no jurisdiction to grant the order asked for.

The contrary, however, seems to have been decided in the case of *Newcombe v. McLuhan* (1886), 11 P.R. 461.

It was also argued by Mr. Woods that the forgetfulness of the solicitor was no valid excuse, as shewn by his authorities. He pointed out the great and long continued laches of the plaintiffs; and that it might be a serious prejudice to the defendant to have to contest such a stale claim.

In these contentions there is much force.

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Here, however, as in other matters, I think that Rule 312 * lays down the principles which are to govern the exercise of all discretionary powers under the Judicature Act. These, as I understand them, oblige me to allow the motion so that "the real matter in dispute" may be determined, which is the liability of the defendant to the plaintiffs.

If I were to decide the motion on my own opinion of whether or not the solicitor for the plaintiffs was excusable in his forgetfulness, or whether his neglect should be a bar to his clients, this would be to determine, not the real matter in dispute in the action, but whether or not the solicitor's omission was properly to be considered a reason for barring the claim of the clients.

Looking at the usual course of dealing with such motions, and the fact of the statute being a bar to a new action, I think the motion should be granted.

It is to be remembered that the plaintiffs have sufficient confidence in their case to be ready to give the necessary security, so that the defendant will not suffer any damage if the confidence of Mr. Woods in his successful defence is justified by the event.

The plaintiffs, however, should pay all costs of this motion, commencing with the 28th January last, within a week after taxation, and should also first put in the necessary security forthwith. In default of compliance with either of these provisions, the motion will be dismissed with costs.

The default here was of a very different character from that of the cases cited against the motion. The present case does not seem to differ in principle from *Collinson v. Jeffery, supra*.

* 312. The Court or a Judge may, at any time, amend any defect or error in any proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute, and best calculated to secure the giving of judgment according to the very right and justice of the case.

T. T. R.

[DIVISIONAL COURT.]

RE DILLON ET AL. AND VILLAGE OF CARDINAL.

D. C.

1905

April 26.
May 11.

Municipal Corporations—Intoxicating Liquors—By-law—Local Option—Voting on By-law—Irregularities—Saving Clause of Statute.

Upon an application to quash a local option by-law of a village, approved by the electors by a vote of 124 to 117, it was alleged that in taking the vote the requirements of the Municipal Act had not been complied with, in that: (1) no newspaper was designated by the council wherein the by-law should be published; (2) one person was not appointed to attend the polling on behalf of those interested on each side; (3) persons were allowed to vote who were not so entitled; (4) no compartment was provided wherein a voter could mark his ballot screened from observation; (5) other persons were present in the compartment with the voter; (6) other persons were allowed to be in a position to see how the voter marked his ballot; (7) persons were allowed to be in the polling place who were not entitled to be there; (8) the returning officer did not perform various duties required of him at and after the close of the poll.

Some of the allegations were disproved in fact. As to matters which were proved:—

Held, that they were irregularities which did not affect the result, the voting having been conducted in accordance with the principles laid down in the Act, within the meaning of sec. 204; and the motion was refused.

Decision of *MAGEE, J.*, affirmed.

MOTION by W. Dillon and S. A. Maloney for a summary order quashing a local option by-law of the village. The facts are stated in the judgment.

The motion was heard by *MAGEE, J.*, in the Weekly Court on the 19th April, 1905.

G. H. Watson, K.C., and *P. K. Halpin*, for the appellants.

W. E. Middleton, for the village corporation.

April 26. *MAGEE, J.*:—This is an application by two persons who are voters and hotelkeepers in the village of Cardinal to quash what is commonly known as a "local option by-law" passed by the village council for prohibiting the sale by retail of intoxicating liquors within the village.

Such by-laws in incorporated villages are authorized by sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, but that section requires that before being finally passed they shall be duly approved of by the electors in the manner provided by the sections in that behalf of the Municipal Act.

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Sections 338 to 374 of the latter Act prescribe certain proceedings for ascertaining the assent of the electors to by-laws for which it is a requisite, and of these sec. 351 directs that the proceedings at the poll and for and incidental thereto shall be the same as nearly as may be as at municipal elections, and makes secs. 138 to 178 and 180 to 206 applicable, except in so far as otherwise provided. This by-law was submitted to the electors on the 2nd January, 1905, at the same time as the annual municipal elections, and was declared by the clerk to have been carried by a vote of 123 against 114, which figures, however, on a scrutiny of the ballots before the county Judge were changed to 124 and 117 respectively, leaving a majority of only 7 in its favour. It was finally passed by the council on the 9th January, 1905.

The applicants complain that the requirements of the Municipal Act were not complied with. They state 20 grounds in their notice of motion. Of these numbers 1, 5, 6, 19, and 20 are in general terms covering the others, and No. 4 was abandoned and was in fact disproved. Those urged may be classed under 8 heads :—

1. That no newspaper was designated by the council, as the Act requires, wherein the by-law should be published (objection 2.)

2. Non-appointment of one person to attend the polling on behalf of those interested on each side (objection 3.)

3. Persons being allowed to vote who were not so entitled (objections 7 to 10.)

4. Absence of a compartment wherein a voter could mark his ballot screened from observation (objection 11.)

5. Presence of other persons in the compartment with the voter (objection 12.)

6. Allowing other persons to be in a position to see how the voter marked his ballot (objection 12.)

7. Allowing persons to be in the polling place who were not entitled to be there (objection 13.)

8. Non-performance by the returning officer of various duties required of him at and after the close of the poll (objections 14 to 18.)

Let us take these in their order.

First, sub-sec. 2 of sec. 338 of the Municipal Act is relied on as requiring that the council shall by resolution designate the newspaper in which the by-law with notice of the polling is to be published, and Mr. W. H. Dillon, a member of the council, makes affidavit that the council did not do so. It is shewn, however, that in March, 1904, a resolution had been passed awarding to the proprietor of the *St. Lawrence News*, published in the neighbouring village of Iroquois, for a fixed sum, all general printing and advertising of the village for the year 1904, and that Iroquois is the nearest municipality wherein a newspaper is published, and that the by-law and notice were published in that paper accordingly. The reeve also makes affidavit that he inserted the name of the newspaper in the notice at the council board. It is not clear that the Act requires the particular newspaper to be designated or more than the locality of its publication. However, I am of opinion that the previous standing resolution was sufficient. Even if it were not, the statute having been substantially complied with—counsel for the applicants claimed that the vote cast was the largest in the history of the village—I would not feel called upon to interfere with the result upon that ground. See *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51; *Re Pickett and Township of Wainfleet* (1897), 28 O.R. 464; *In re Lake and County of Prince Edward* (1876), 26 C.P. 173; and *Re Fenton v. County of Simcoe* (1885), 10 O.R. 27.

Next, as to the appointment of agents or scrutineers under sec. 342. It is shewn that the reeve did appoint not only one agent for each side to attend the polling, but two. This ground, therefore, fails, whatever effect the presence of the additional agent in the polling place may have under the fifth class of objections.

Third, as to persons being allowed to vote who were not entitled. The applicants read affidavits of 10 persons who say their names were on the list and they voted. They either assert that they were not qualified to vote or state facts from which it is argued they were not. These 10 persons are W. Bearsford, E. Shaver, M. L. Connolly, R. Van Camp, E. Galbraith (an alien), J. T. Moore, John Whalen, W. J. Woodland, B. Tyo, and P.

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McLean. The present sections 353 and 354, declaring who were entitled to vote on by-laws, were in 1903 (by 3 Edw. VII. ch. 18, secs. 75 and 76), restricted to by-laws for contracting debts. The persons entitled to vote on this by-law were those entitled to vote at municipal elections: see *In re Croft and Town of Peterborough* (1890), 17 A.R. 21. The sections material here as to qualification are secs. 86, 89, 116, and the forms of oaths to be taken by the four classes of voters when required under secs. 112 to 115. Under sec. 86 freeholders need not be residents, but other voters must, but by sec. 116 the voter must select which form of oath he will take. Reading the affidavits in the light of these sections, E. Shaver and P. McLean were duly qualified, and both make subsequent affidavits for the respondents shewing that they were so. B. Tyo does the same, and adds that he voted against the by-law. This leaves only 6 votes alleged to be bad, and of these R. Van Camp makes a subsequent affidavit for the respondents that he was asked by both the applicants to vote against the by-law and did so, and was assured by one of them that he was duly qualified. If matters so rested, there would be one bad vote against the by-law and 6 bad votes as to which there would be no evidence on which side they were cast. The fact that these 6 persons are now willing to assist in quashing the by-law by making affidavits of their own illegal acts, hardly induces one to infer that they voted for it; but it is shewn that two of them, Moore and Galbraith respectively, were driven to or towards the poll by one applicant and the son of the other. Bearsford's affidavit is qualified in a way which does not make it clear he was not entitled to vote. Even if all 6 had no right, and if it were possible that they voted for the by-law, the striking off that number would still leave it with a majority of two. Beside those 10 affidavits, the applicants read another made by Matthew Sim that his son was on the list and voted and was under 21 years of age. He does not give any information as to how he knew that his son voted, and his affidavit is, therefore, of no value, but he makes a subsequent affidavit for the respondents repeating that his son voted and adding that he has reason to believe and believes that his son voted against the by-law. If his belief is in accordance with fact, the majority would be increased by one. The infer-

ence one is strongly tempted to draw is that the by-law was carried by 15 instead of 7. Be that as it may, the objections of this class fall to the ground on the facts. It was urged for the respondents that there could not be an inquiry into the validity of votes cast on either side, and that no instance of one is reported, and that sec. 89 makes the voters' list final, and sec. 200 protects a voter from having to disclose how he marked his ballot, and that the only protection is to require the voter to be sworn at the poll. Whether it be that such an inquiry has not been actually necessary in any case, Mr. Justice Britton in *In re Salter and Township of Beckwith*, 4 O.L.R. 51, found the objection to certain votes on a local option by-law based on non-qualification were not well founded in fact. In *In re Coe and Township of Pickering* (1865), 24 U.C.R. 439, where a by-law under the Temperance Act of 1864 was in question, the possibility of the Court *in banco* having to enter upon such a scrutiny was not viewed with equanimity. A majority obtained by illegal votes does not present itself as not being an illegality such as the statute contemplates as a ground for quashing.

Fourth, as to the absence of a screened compartment. This is disproved in fact. It is shewn, indeed, that there were two compartments in either of which a voter could mark his ballot in secrecy. It was then argued by the applicants that there was no right to have more than one and that the presence of two voters at once in the polling place was irregular, but this comes under the seventh class.

Fifth, as to the presence of other persons with the voter in the compartment. This is negatived in fact. The only instance alleged was that the son of a Mr. Crawford, a voter who was partially crippled, went with him into the compartment while he marked his ballot. Mr. Crawford makes affidavit that his son only assisted him to the compartment but stepped back and did not enter it and did not see him mark his ballot. The presence of the son in the polling place comes under the seventh class.

Sixth, allowing other persons to be in a position to see how the voter marked his ballot. There is no proof of this and it is negatived. The only basis for it other than Mr. Crawford's case is that a number of persons were allowed in the farther end of

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the hall in which the polling took place. They were about 39 feet distant from the nearer of the two compartments, and, although they could see a voter going in, they could not see how he marked his ballot.

Seventh, allowing persons to be in the polling place who were not entitled to be there. The polling was held in the municipal hall of the village, as has been the custom there for years at parliamentary and municipal elections, and, as already mentioned, the annual municipal election was held on the same day. The hall, a plan of which is put in, is about 32 feet in width and 68 feet in length and on the ground floor. The end opposite the entrance door is occupied by a raised stage or platform taking up about 18 feet of the length; the seats in the body of the hall in front of this stage were on polling-day moved close together, leaving a clear space 20 feet wide all across the hall in front of the stage, between it and the seats. This clear space was used as the polling-place. An aisle or passage led down the middle of the hall from it towards the door for the voters to come and go. The seats when put close together took up about 22 feet more of the length, leaving another clear space about 8 feet wide and all across the hall next the entrance door. It is said that sometimes as many as 30 persons altogether would be in the hall, but it is not shewn that, except in three instances, any one other than the officers and agents, constable, and voters actually engaged in voting, were ever nearer the polling-place than this eight-foot space, in which there was a stove. The constable was instructed to keep all others back, and all but the returning officer and agents were put out of the hall when the ballots were being counted. These arrangements at the polling-place have been usual for years at all elections in Cardinal. There would be nothing to prevent persons in the eight-foot space from seeing voters going forward to the returning officer's table 25 or 30 feet distant, and what took place there might be seen but could not ordinarily be heard. It is said that upon several occasions there would be as many as three voters at once in the polling-place itself, one in each compartment marking his ballot, and a third at the table applying for one. The three instances referred to of others being allowed in that space, are those of young Crawford while assisting his father,

one Baker who on one occasion went forward and spoke to the returning officer, and one Feeder. It is not alleged that any other voter was in the polling place while Baker was there. Feeder, it is alleged, sat about 14 feet from the ballot box and on the side of the front line of seats, and checked off the voters with a voters' list as they polled their votes, and left that seat and went to other parts (not stated) of the hall and returned at intervals during the greater part of the polling. The affidavits as to both Baker and Feeder are put in by way of reply. They merely go to support by details the charges made in the affidavits on which the motion is founded, and should have formed part of the applicants' case in chief, and it would be unfair to allow such details in reply when there is no opportunity of meeting them. See *Regina ex rel. Preston v. Touchburn* (1876), 6 P.R. 344. In some way apparently the mention of Feeder's name must have become known to the respondents, for he makes an affidavit on the 21st March, before those alluding to him were filed but on the day they were sworn, and says that after voting he sat down near the constable and talked with him, and that no one voted during that time, and as soon as the returning officer noticed him his removal was ordered, and he saw no voter mark his ballot paper, and he could not hear anything which was said by the returning officer or any of the agents. It is noticeable that one of the three affidavits referring to him, that made by John Delaney, one of the agents against the by-law, merely says Feeder sat there for a length of time. There is no hint that any one but the returning officer objected to Feeder's presence, so it would hardly seem probable he was there long. It is said that the presence of so many people is contrary to the Act and destroys the secrecy of the ballot, and that there should be only one compartment for ballot marking and only one voter and one agent on each side present at one time besides the returning officer and poll clerk, who with the agents are sworn to secrecy. As to the people in the space at the entrance door I would hold that they were not in fact in the polling place, which was the space 22 feet distant and separated from them by the rows of seats. As to the presence of more than one voter at a time a word may be necessary. Section 145 requires that every polling place shall be furnished with a compartment in

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which the voters can mark their votes secure from observation. Taken literally sec. 145 does not exclude the idea of several voters at once in the one compartment if it is large enough or so constructed as to permit of secrecy for each. For the provincial elections the Legislature requires "a sufficient number of compartments." For the Dominion elections "one or two compartments" are directed. There are no greater number of electors for them than for municipal elections. Section 536 requires one polling place for every 300 voters. As polling time is only 8 hours, and voters come at some hours in greater numbers than at others, and at some municipal elections there are several and sometimes complicated ballots to be marked, it might be impracticable to take the vote if only one at a time were admitted.

The object of subdivisions was to prevent crowding. I do not think the necessity of providing one excludes the idea of providing more if deemed necessary for convenience and despatch.

Then it is said that the Act contemplates not only secrecy as to how a man votes, but as to whether he has voted, and therefore no one unpledged to secrecy should be allowed to know whether he asks for or deposits a ballot paper, and for this the form of declaration of secrecy, schedule I., prescribed by sec. 199, is referred to as promising not to disclose the name of any person "who has voted" nor how he has voted. Looking at sec. 162, sec. 198, and sec. 367, it would be questionable whether voting meant anything but the actual marking of the ballot, and in *In re Canada Temperance Act and City of St. Thomas* (1885), 9 O.R. 154, Mr. Justice Rose considers a vote the expression of a choice and a rejected ballot apparently not a vote. It is as important to keep secret whether a man has improperly marked or left unmarked his ballot as how he marked it. It is not important to know whether he applied for or deposited one. If the Act were read so as to forbid that, it would in practice be futile, and if it could be made effective it would be harmful, as it would tend to aid and shield persons improperly voting more than once. Apart from the form in schedule I., there is nothing in the sections referring to secrecy (sec. 198 and sec. 367) or elsewhere in the Act to indicate that secrecy upon the subject of depositing a ballot is required. Now schedule I. does

not apply and would not be suitable to voting on by-laws. For them the form in schedule M. is provided, and sec. 351, in making secs. 180 to 206 applicable to by-law voting, expressly says, except in so far as herein otherwise provided. The form of declaration in schedule M. makes no promise of secrecy as to whether the elector has voted. So that there is no objection on that score to any one seeing the request for or deposit of a ballot paper as to a by-law, and the presence in the polling-place of other electors who are voting would seem unobjectionable.

As to the number of agents or scrutineers, sec. 342, relating to voting on by-laws, provides for the appointment by the reeve of "one person to attend at each polling place" on behalf of those interested on each side, and, by sec. 345, in the absence of such person an elector may take his place, and sec. 346, like sec. 173, provides that no person shall be entitled or admitted to be present in any polling place other than the officers, clerks, and persons or electors authorized to attend as aforesaid.

Why only one agent on each side is mentioned it would be difficult to say. Two are allowed at the comparatively less important function of summing up the votes. Section 175 allows two agents for each candidate at municipal elections. The like number are allowed at Provincial and Dominion elections. It was doubtless this which led to the mistake in this instance. In the practical working out of a municipal election it frequently occurs that an elector wishes to or can vote as to only one or less than all of the several offices, by-laws, or questions before the people. If he asks for only one of several ballots there may be a dozen or more of agents surrounding him who are not interested in the ballot he asks for, and these will also see the ballots after the close of the poll. The restriction as to number of agents present is manifestly one of convenience combined with protection of all interests and of the principle of secrecy, as to the actual marking of the ballots.

In *Regina ex rel. Preston v. Touchburn*, 6 P.R. 344, the objections raised were much the same as here, except as to the number of agents, and Chief Justice Harrison refused to avoid the election, as he saw no ground for thinking that the result would have been different if the irregularities complained of had not occurred. As he says, "The thing to be obtained is, a fair

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election substantially according to law, and if this appear to have taken place, resulting in a majority to some one or more of the candidates, that result should not be disturbed merely because some officer or person has disregarded or neglected some direction of the statute deemed necessary by the Legislature to secure a proper election." And again: "Officers and others who violate the directions of such an Act are liable to be punished in the manner the Act prescribes, but in the absence of some express declaration it would be manifestly inconvenient and unjust to set aside the election for the mere irregularity or misconduct of the officers or others than the candidates concerned in the election." In numerous other cases similar remarks have been made by Courts and Judges. In *Re Pickett and Township of Wainfleet*, 28 O.R. 464, Mr. Justice Osler says (p. 468): "Everything was conducted in the loosest way and with a disregard of the plain directions of the Act which is surprising. Had there been nothing else, it is possible the election might have been upheld under sec. 175" (corresponding to sec. 204 of the present Act), "even against those I have noted." In that case he set aside a by-law repealing a local option by-law, but apparently only on the ground of absence of proper notices to the public. In this present case there is the presence of the two extra agents at the counting of ballots. They had made the declaration as to secrecy. There is no suggestion of anything having occurred which in any way affected the result, and I see no reason to interfere with the actual decision of the electors, previously given, merely because these two persons were present at its ascertainment.

The eighth and last class of objections cover several acts of omission and commission by the returning officer. They mostly are sought to be made out by the poll clerk, who has made three affidavits for the applicants to prove breaches of the law to which he was himself a party. He lightheartedly swears that the voting was conducted in a loose, irregular, improper, and illegal manner, and that the returning officer at the close of the poll did not perform the duties required of him, but he does not hint that he or any one else suggested anything better. If, before assuming the duties of poll clerk, he had taken a small part of the pains which presumably he must since have been at, to

acquire the knowledge to enable him to swear that what he and the returning officer had done was illegal, he might have saved the village this litigation. It appears that at the close of the poll the ballots were counted in the regular way in presence of the agents for both parties and the result announced to them by the returning officer as 123 for and 114 against the by-law and 9 rejected ballots. The agents seem to have been satisfied, for they left the returning officer and poll clerk to finish their duties without waiting to have a statement drawn up or signed under sec. 359 or to seal the packets of ballots, etc., under sec. 361. By the time these ballots were counted and the result announced it was 6 o'clock, and there were other ballots to count for the municipal election, and the hall had to be made ready for some public entertainment of that evening, and, apparently considering that the more important part of the work had been done, and being left alone, it was decided to complete the other necessary formalities at the returning officer's house. So the returning officer put the ballots in the ballot box, and he and the poll clerk went to their respective homes for supper. The poll clerk joined him at about 7.20 p.m., and they went on with their work, adding up the poll book, and making out the statement, etc., and after about an hour and a half the poll clerk left the house accompanied by the returning officer. He says the latter put the spoiled ballots and rejected ballots together in one envelope, and when they went out the returning officer left the spoiled and rejected ballots, poll book, and "other forms" (which I would not take to include ballots) on his table in the house, and none of them were sealed or fastened in a package, and that the returning officer's wife and daughter and one James Saver were then at the house. It does not appear how long the returning officer was absent, or that any of these three persons had access to or were in the room in which the papers were left. With regard to the spoiled ballots there is no other reference to the fact that there were any, and I would conclude from the papers that what the poll clerk calls the spoiled ballots was a single ballot which the learned county Judge certifies he found with the rejected ballots and was shewn to him to be a ballot given to a person not on the list and which had not been counted. The poll clerk himself speaks of such a ballot and says it had

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not been put in the ballot box. The returning officer may not unreasonably have thought it should not be put in the category of spoiled ballots, though not strictly a rejected one. Mr. Halpin, the applicants' solicitor, who attended on the scrutiny before the county Judge, makes affidavit of the condition of the books and papers when produced there, and the only deficiencies he mentions are that the packets containing the ballots were not sealed with wax and the poll book was not in a sealed packet but wrapped in a newspaper and the ballot box was not sealed. Nowhere does the Act require wax nor the sealing of the box, and, though sec. 377 requires the poll book in the case of by-laws to be in a packet with other papers, it is to be noticed that at elections sec. 177 only requires it to be delivered to the clerk, and makes it open to inspection by any elector. Here the clerk was returning officer and deputy returning officer combined. The poll clerk also says that the returning officer "did not take a note of the objections made to the 4 ballots objected to and not counted nor did he number said objections or ballots." There is no explanation of what 4 ballots are referred to or what objections. The returning officer says there were no objections to his course. For all that appears, no one objected to any of the ballots but the returning officer himself. The county Judge rejected 4 ballots less than the returning officer. There is no assertion that the rejected ballots were not marked "rejected," or that there was any difficulty whatever on the scrutiny. As the poll clerk seems willing to disclose all the faults of the day, it may be assumed that the separate packets of ballot papers required by sec. 361 were made up at the polling place, though not there marked as to their contents or sealed with the returning officer's seal. Withal there is not a suggestion of any tampering with ballots or results or of any injury being done or of the irregularities complained of having in any way affected the result. The returning officer explains that this was his first experience, he having been appointed clerk only in March, 1904, and says that everything was done in good faith, and he did all he could to conduct the election fairly and without fear, favour, affection, or hope of reward from either side. Manifestly the agents on each side were satisfied, for no objection to anything is heard of from any of them. In *Regina*

ex rel. Preston v. Touchburn, the conduct of the returning officer was more objectionable than here. In the cases cited for the applicants there was the reasonable probability that the result might have been affected by reason of the public not having proper notice. Here there is not. The majority is narrow, but the Legislature has given the bare majority the right to pass such measures, and sec. 204 prevents irregularities from rendering elections invalid, if it appears that the election was conducted in accordance with the principles laid down in the Act, and that such irregularities did not affect the result. The voting was, I think, conducted by the returning officer not loosely but in a reasonably careful manner and in accordance with those principles.

As said by Chief Justice Hagarty in *In re Hulson and Township of South Norwich* (1892), 19 A.R. 343, "where a rural population is intrusted with limited powers to pass local by-laws, we must not be hypercritical as to exactitude of procedure:" p. 351.

In view of the cases already referred to and *Re Young and Township of Binbrook* (1899), 31 O.R. 108, and *In re Wycott and Township of Ernestown* (1876), 38 U.C.R. 533, I do not think I should grant this application. The motion is dismissed with costs.

The applicants appealed from the order of MAGEE, J., and their appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and ANGLIN, JJ., on the 9th and 10th May, 1905.

G. H. Watson, K.C., for the appellants, contended that the illegal and irregular practices shewn were sufficient to warrant the quashing of the by-law, referring to *Re Pounder and Village of Winchester* (1892), 19 A.R. 684; *Re Brophy and Village of Gananoque* (1875), 26 C.P. 290; *Hall v. Rural Municipality of South Norfolk* (1892), 8 Man. L.R. 430; *Re Miles and Township of Richmond* (1869), 28 U.C.R. 333; *In re Wycott and Township of Ernestown*, 38 U.C.R. 533; *In re Coe and Township of Pickering*, 24 U.C.R. 439; *Re Pickett and Town-*

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ship of Wainfleet, 28 O.R. 464; *Re Mace and County of Frontenac* (1877), 42 U.C.R. 70; *In re Salter and Township of Beckwith*, 4 O.L.R. 51.

W. E. Middleton, for the village corporation. Section 378 of the Municipal Act confers no jurisdiction to quash a by-law for irregularity, but only for illegality: *Re Fenton v. County of Simcoe*, 10 O.R. 27, 40. Unless a by-law is illegal on its face, the Court has a discretion: *In re Huson and Township of South Norwich*, 19 A.R. 343, 350; *Regina ex rel. Preston v. Touchburn*, 6 P.R. 344. The result of all the cases is, that where there is the absence of a condition precedent, the by-law must be quashed, otherwise not. The voting was conducted in accordance with the principles laid down in the Act, and the result was not affected by the irregularities: sec. 204 of the Municipal Act.

Watson, in reply. What is illegality? If the statute is not complied with, there is surely illegality. The onus is on the respondents to shew that the election was properly conducted and the result not affected.

May 11. FALCONBRIDGE, C.J.:—We are all of opinion that the judgment of Magee, J., is entirely right and should be affirmed. In applying the saving clause of the Municipal Act, sec. 204, it is no matter in this case on which party the onus lies, for the evidence shews clearly that the result was not affected by the irregularities.

The appeal will be dismissed with costs.

BRITTON, J.:—I am of opinion that this is a case for the application of sec. 204 of the Municipal Act. The council of the village of Cardinal intended that the voting upon the by-law in question should be, and the voting in fact was, conducted in accordance with the principles laid down in that Act. In so far as there was any non-compliance or irregularity or mistake, it seems clear to me from a careful perusal of the affidavits and papers filed, and a consideration of the arguments addressed to the Court, that the result of the voting upon the by-law was not affected thereby.

It is important, in considering the objections to what was done and omitted by the returning officer after the close of the poll, to note that in this village there was only one polling place, and that the clerk of the village was himself the returning officer. In cities and towns a deputy returning officer shall in no case take, or allow a ballot box to be taken, to his house or office or place of business, but it must be delivered at once to the clerk of the municipality : see sec. 177, sub-sec. 4. In this case the clerk was the custodian of the ballots which as returning officer he had received.

I think the motion fails.

ANGLIN, J., concurred.

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THEAKSTONE V. THEAKSTONE.

Sept. 26.
Oct. 12.*Alimony—Interim—Husband's offer to pay for necessities.*

It is not a sufficient answer to a motion for interim alimony where cruelty is alleged, that the husband has offered to allow the wife to get whatever is necessary for the house, in which both are living but not on friendly terms, and to pay for all such goods.

Snider v. Snider (1885), 11 P.R. 140 distinguished.

Lovell v. Lovell (1905), 5 O.W.R. 401, 640 followed.

THIS was a motion for interim alimony and disbursements.

The motion was argued on the 25th September, 1905, before Mr. Cartwright, the Master in Chambers.

T. N. Phelan, for the plaintiff.

A. R. Hassard, for the defendant.

September 26. THE MASTER IN CHAMBERS :—The financial ability of the defendant is admitted. The motion is resisted on the ground that the plaintiff is really taking action because her husband will not allow her to receive and lay out as she thinks best the money necessary for the household expenses.

The parties have one child, a daughter of about ten years of age. They are living in the same house, though not on friendly terms. The defendant has offered to allow his wife to get whatever is necessary for the house and to pay for all such goods.

On these grounds, counsel for defendant urged that this case comes within *Snider v. Snider* (1885), 11 P.R. 140. But there the decision of the learned Chancellor was put on this ground : pp. 142, 143, "The plaintiff's case rests on alleged desertion by the husband—*no cruelty is pleaded*. The husband is willing and offers, both by defence and by affidavit, to resume cohabitation with the wife, who is still living in his house.

"If she accepts this offer, the action is at an end: if she refuses it, then she is at fault, and he is no longer guilty of desertion."

In that case, desertion was the whole ground of action. Here, it is alleged that the defendant refused to support the plaintiff and assaulted her and used violent and abusive language towards her both in 1901 and after her return to live with him in 1903. In this latter period, it is alleged that defendant has refused to support her and has acted in a violent and abusive manner towards her—that he has accused her of infidelity and has many times threatened the life of the plaintiff and of her child. This entirely distinguishes this case from *Snider v. Snider* (*supra*).

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Following the latest decision, *Lovell v. Lovell* (1905), 5 O.W.R. 401, affirmed 640, I think the order should go. There should be interim alimony at the rate of \$10 a week to commence from 3rd September, instant, and \$25 for interim disbursements.

The case should be brought to trial as soon as possible.

I have read the depositions of the parties, but it is not proper to express any opinion on the merits.

The defendant appealed from the above judgment, and the appeal was argued on the 10th October, 1905, before FALCONBRIDGE, C.J.K.B., who on the 12th October, 1905, dismissed it with costs to the plaintiff in any event.

G. A. B.

[IN THE COURT OF APPEAL.]

C. A.

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June 29.

DELAHANTY v. MICHIGAN CENTRAL R.W. Co.

Railway—Disorderly Passenger—Expulsion from train—Fatal Accidents Act—Evidence of Negligence—Damages—Remoteness.

A passenger travelling from Detroit to Buffalo on defendants' train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, amongst others of molesting fellow-passengers. He was put off the train at Bridgeburg, a station near the Canadian end of the International Railway Bridge crossing the Niagara River, and about a mile distant from his destination. He followed the train on foot and after a scuffle with the bridge guard jumped or fell off the bridge into the river and was drowned :—

Held, that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of some one at Bridgeburg.

On the evidence it was impossible to say whether deceased fell off the bridge accidentally or threw himself off; or that his death was the natural or probable result of his being removed from the train.

Held, also, that there was no evidence of any negligence on the part of the defendants to be submitted to a jury.

Judgment of BRITTON, J., 7 O.L.R. 690 reversed.

THIS was an appeal, from the judgment of Britton, J., reported in 7 O.L.R. 690, which was argued on the 12th and 15th of March, 1905, before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

Hellmuth, K.C., and *D. W. Saunders* for the appeal. The defendants were not guilty of any negligence. The deceased was apparently not drunk when he entered the train and he behaved himself for a considerable part of the journey. Later he became noisy and mischievous and finally molested passengers in their sleeping berths, but was quite able to take care of himself; and the conductor was amply justified in expelling him from the train as he did at the station at Bridgeburg. The fact that that station was a short distance from the Niagara River and from the International Railway Bridge did not make his expulsion there negligence on the part of the defendants. Negligence may be inferred by a jury from evidence properly submitted, but the evidence given must be such that negligence may properly be inferred from it: *Metropolitan Railway Co. v. Jackson* (1877), 3 App. Cas. 193, at p. 200. The defendants were not only justified in putting the deceased off

the train, but they were bound to do so : *The Canadian Pacific Railway Co. v. Blain* (1903), 34 S.C.R. 74. The death of the deceased could not reasonably have been expected as a consequence of his expulsion from the train and the defendants are not liable for such consequence even if the expulsion was wrongful, and such consequence was too remote, and the damages are unreasonable : *Louisville & Nashville R.R. Co. v. Logan* (1889), 88 Ken. 232, Lawyers' Rep. Ann. 80 ; *Railway Co. v. Valleley* (1877), 32 Ohio St. R. 345 ; *McClelland v. The Louisville, New Albany & Chicago R.W. Co.* (1883), 94 Ind. R. 276 ; 18 Am. & Eng. R.R. Cases 260. The question of remoteness is for the Judge and should not have been submitted to the jury : *Hobbs v. The London & South-Western R.W. Co.* (1875), L.R. 10 Q.B. 111, at p. 122 ; *McMahon v. Field* (1881), 7 Q.B.D. 591, at p. 595. Mayne on Damages, 6th ed., 600 ; Ray on Negligence of Imposed Duties, (passenger carriers) p. 166.

Shepley, K.C., and G. H. Pettit, contra. The evidence shews that when the defendants accepted the deceased as a passenger he was drunk, and further that they supplied him with more liquor on the journey. It may be that he was boisterous, but he at once submitted to authority and did as he was told when remonstrated with. He could easily have been restrained and quieted until the train arrived at the journey's end in about twenty minutes. There was nothing in his conduct to exasperate a reasonable conductor, and even if the latter had to protect his passengers he should do so with discretion. His ticket was taken from him and the defendants were trespassers when they put him off without it where they did in a place of danger, and what happened might naturally have been expected as the result. The jury should decide if what was done was the proper thing to do. We refer to *Evans v. St. Louis Iron Mountain & Southern R.W. Co.* (1882), 11 Mo. App. Rep. 463 ; *Winkler v. St. Louis Iron Mountain & Southern R.W. Co.* (1886), 21 Mo. App. Rep. 99, at p. 105 ; *Sneesby v. The Lancashire & Yorkshire R.W. Co.* (1875), 1 Q.B.D. 42 ; *McKelvin v. The City of London* (1892), 22 O.R. 70 ; *Hogg v. The Corporation of the Township of Brook* (1903), 7 O.L.R. 273 ; *Grinstead v. The Toronto Railway Co.* (1894), 24 O.R. 683, 21 A.R. 578 ; (1895), 24 S.C.R. 570 ; 2 Beven's Negligence in Law, 2nd

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ed., p. 1152 *et seq.*; *Chicago, Rock Island & Pacific R. Co. v. Barrett* (1884), 16 Ill. App. 17; *Arnold v. The Pennsylvania R.R. Co.* (1886), 115 Penn. St. 135; *Pittsburg & Connelville R. Co. v. Pillow* (1874), 76 Penn. St. 510; *Meyer v. St. Louis I. M. & S. R. Co.* (1893), 54 Fed. Rep. 116; *Putnam v. The Broadway & Seventh Avenue R. Co.* (1873), 55 N.Y. 108; *The Pennsylvania R. Co. v. Peters* (1887), 116 Penn. St. 206; Am. & Eng. Ency. of Law, 2nd ed., vol. 5, p. 599; *Wardwell v. Chicago, Milwaukee & St. Paul R. W. Co.* (1891), 46 Minn. 514.
Hellmuth, in reply.

June 29. The judgment of the Court was delivered by MACLENNAN, J.A.:—The question in this appeal is whether there was evidence on which the jury could properly find a verdict for the plaintiffs.

A motion was made for a nonsuit but the learned Judge allowed the case to go to the jury and reserved the question of a nonsuit for subsequent consideration. The jury found for the plaintiffs with damages to the wife of the deceased \$3,000, and to the infant daughter \$2,000.

Subsequently the learned Judge in a reserved judgment overruled the motion for a nonsuit and directed judgment for the plaintiffs in accordance with the verdict of the jury.

The undisputed facts are very brief. The deceased was a first-class passenger in the defendants' evening train from Detroit to Buffalo. He was a strong athletic man about 36 years of age. In the course of the journey he indulged in drinking to an extent which excited him mentally but not physically. He committed several disorderly acts by the way, ringing the bell in the smoking compartment, smashing the glass over the tool case, and finally interfering with a gentleman, and also with a lady lying in their berths.

This last occurrence was a short time before the train reached the Bridgeburg station, situate about 700 feet from the entrance to the International Railway Bridge, which spans the Niagara River.

On arriving at the station about 10.30 p.m. the conductor required him to leave the train, which he did with little or no objection, and he was told that there was the station and the

waiting room. The track on which the train stood was opposite to the station, but 60 or 80 feet therefrom, and when the train started he had moved some distance towards the station.

The International bridge is an iron frame, composed of horizontal chords or girders connected by transverse, nearly upright columns. It is not a foot or carriage bridge, but merely a railway bridge. It is however used as a footway by the railway servants and by others with the permission of the Grand Trunk Railway Co. who are the owners. There is no continuous floor, but the ties lie so closely that a person could not fall through. The sides, at track level, are composed of girders fifteen inches high and two feet wide, from which columns rise, at intervals, to other girders above. There is also a lattice work over the lower girders. Besides this a wooden stringer ten inches thick runs along adjacent to the girders on both sides at track level.

Soon after the train had passed, the bridge guard, who was in the bridge office, saw deceased from a window passing upon the bridge. Soon afterwards another train emerged from the bridge going westerly. The guard then took his lamp and proceeded to walk over the bridge. After walking some distance he came to span No. 3, and there saw deceased standing against an upright column. He turned his light upon him, and deceased said, "Take that light away or I will knock your damned brains out." He had what appeared to be a stone in his hand. The guard then asked him if he had a permit, or a pass, for the bridge, to which the deceased replied, using the same expression as before. Deceased then got up standing upon the chord or girder. The guard thinking he was drunk or crazy, and might be about to jump into the river, pulled him down. There was a struggle, the light went out, and the guard got his foot between the ties, and had some trouble in extricating it. Meantime deceased had moved on, and soon afterwards the guard heard a splash, and running forward about 140 feet, saw deceased in the river below, and heard him crying out. Before assistance could be procured he was drowned, and his body was afterwards recovered.

There is no evidence that the deceased was unable to take care of himself. He was simply mischievous. His widow in

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her evidence says that when he was on one of his sprees "he was very boisterous, he was devilish, and very ugly. He walked all right, he never did any harm to himself, but he would break up things and act ugly, not with me but things around him, he would make a noise and do things like that."

Now under these circumstances I think, with great respect, there was no evidence of negligence fit to be submitted to a jury.

Negligence is a breach of some duty owed to another. It is said the trainmen should not have put him off; that Buffalo was only about a mile distant, and that they should have carried him to his destination, and should have watched him, and have restrained him from mischief until arrival. But the trainmen all had other duties on approaching a large city, and could not have stood as a guard over this violent man, and so they did the only thing they could do. They set him down and left him in a place of safety.

Again it is said they should have placed him in charge of some one at the station. But what happened between him and the bridge guard shews what would probably have occurred if they had attempted to do that. That he was capable of taking care of himself physically is apparent from his having allowed the second train to pass him on the bridge without injury, and his having afterwards struggled with the bridge guard. Whether he fell over the girder accidentally or threw himself over deliberately it is impossible to decide. But it is equally impossible to say that his death was the natural or probable result of his being removed from the train.

Many cases were cited to us on argument but none which would authorize us to decide that there was evidence of negligence in this case on the part of the defendants, proper to be submitted to the jury.

The appeal must be allowed, and the action must be dismissed.

G.A.B.

[IN CHAMBERS.]

RE SOLICITOR.

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Oct. 7.

Solicitor—Taxation of Bill of Costs—Reference as to—Illness of Deputy-Registrar—Change of Reference.

A deputy-registrar to whom a reference had been made of a solicitor's bill of costs fell ill after the evidence and arguments were all in but before judgment was given and had not been able to attend to his duties for nearly a year. On an application by the client to change the reference to one of the taxing officers at Toronto, which was opposed by the solicitor :—
Held, that the proper course was to refer the matter to the deputy clerk of the Crown.

THIS was an application to change a reference for taxation of a solicitor's bill of costs from a deputy registrar to one of the taxing officers at Toronto under the circumstances mentioned in the judgment.

The motion was argued on September 29th, 1905, before Mr. Cartwright, The Master in Chambers.

Martin Malone, for the motion.

James Bicknell, K.C., contra.

OCTOBER 7. THE MASTER IN CHAMBERS:—On 17th April, 1903, an order was made referring to the deputy registrar for taxation a solicitor's bill, with a "direction to enquire whether there is any agreement binding on the applicant with regard to the solicitor's remuneration for those services, for which he claims the right to retain the sum of \$2,000." If he found in the negative, a detailed bill was then to be rendered and taxed.

On 15th December, 1903, the deputy registrar and local master made an order substituting the assignee of the client as applicant with liberty to proceed with the pending reference, on payment into Court of \$175 as security for costs, which was done.

From affidavits filed on the present motion to change the reference, it appears that the evidence was all in nearly a year ago, and written arguments were put in and judgment reserved.

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Shortly afterwards the deputy registrar became very ill and ever since has been unable to attend to his duties, so that no judgment has as yet been given in the matter.

The assignee now asks to have the reference changed to one of the taxing officers at Toronto. This was opposed by counsel for the solicitor, and in the face of his opposition I do not think that such an order can be made.

The proper course seems to be to refer the matter to the deputy clerk of the Crown; as, in case of a vacancy in the office of deputy registrar he would probably become local registrar of the High Court and assume the duties of the deputy registrar: see O.J.A. sec. 143 (5).

It was objected, on behalf of the solicitor, that there was no medical evidence that the deputy registrar would not soon recover and be able to give judgment. But I think if such evidence is attainable, it should properly come from the other side. No doubt, the applicant might have examined the medical attendants of the deputy registrar as witnesses on the motion, but I do not think it was obligatory on him to do so. From the long delay, the present seems to be a case for the application of the maxim "*res ipsa loquitur*." But the deputy clerk should not be ordered to use the evidence already taken. This could not be done in fairness without his consent and that of the parties.

The costs of this motion will be in the reference.

G. A. B.

[TEETZEL, J.]

RE ROBERTS AND BROOKS.

1905

May 31.

Will—Construction—Executors—Power of Sale—Devolution of Estates Act.

Where the authority to sell real estate is given to the executors, the fee simple is impliedly vested in them for that purpose.

The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate if I have not disposed of it shall be sold and equally divided, and I appoint my stepson . . . and his daughter . . . to execute this my will:"—

Held, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that Act, the executors had, upon the true construction of the will, an express power to sell the real estate.

AN application by the vendor for an order under the Vendors and Purchasers Act, determining a question of title. The application was heard by TEETZEL, J., in the Weekly Court, on the 29th May, 1905.

W. J. Tremeeear, for the vendor.

D. D. Grierson, for the purchaser.

M. C. Cameron, for the official guardian.

The facts and authorities cited appear in the judgment.

May 31. TEETZEL, J.:—The question for determination is whether the executor and executrix under the will of the late Elizabeth Roberts, who died on the 13th February, 1905, can make title without the consent of the official guardian, under sec. 8 of the Devolution of Estates Act, infants being interested in the proceeds.

Testatrix in the first part of her will gives her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeds as follows: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture that would be cumbersome to move had

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better be sold, but the real estate, if I have not disposed of it, shall be sold and equally divided, and I appoint my stepson Harry Roberts and his daughter Annie Roberts to execute this my will."

The executrix and executor having agreed to sell the residence property for \$1,000, the question is raised by the purchaser whether they have power to do so without the consent of the official guardian.

In my opinion the right of the executors to sell is not affected by the Devolution of Estates Act, because I think the real estate has by the will devolved upon the executors quite independently of sec. 4 of that Act.

I think the intention of the testatrix, to be gathered from the whole will, is that the sale and division of the estate shall be carried out by her executor and executrix, and, notwithstanding the gift of the estate in the first part of the will directly to the beneficiaries, the authority in the latter part of the will to the executor and executrix to execute the will, must mean to sell the real estate and divide the proceeds equally. If she had not expressly authorized them to do so, they would have been authorized under sec. 21 of the Trustees Act to make the sale.

Where the authority to sell real estate is given to executors, the fee simple is impliedly vested in them for that purpose. See *Davies to Jones and Evans* (1883), 24 Ch. D. 190.

In that case a testator, after directing his debts to be paid, and setting apart certain sums to provide annuities for two sons, devised and bequeathed all his real and personal estate to his wife and four daughters to be equally divided between them: Provided as follows, that the share of his wife should be divided after her death between his four daughters or the survivors and their children; and the testator appointed his wife and T. Davies, his executors, to act jointly in carrying out all the intentions of his will and to invest his daughters' shares for their benefit and the benefit of their children; and it was held upon application under the Vendors and Purchasers Act, that the legal estate in the freeholds was vested in the executors, who could make a good title to a purchaser. Pearson, J., at p.

194, quotes the following from *Anthony v. Rees* (1831), 2 Cr. & J. 75, 83: "When trustees are directed to do anything for the performance of which the legal estate is requisite they are to have the legal estate;" and then proceeds as follows: "Now the rule is, and always has been, that you must find out the intention of the testator from the whole will taken together and decide according to that; and though there may be words capable of a different meaning, still if it appears on the whole construction that you cannot give effect to the will unless you give the executors a legal estate, then you must hold that they have the legal estate."

In *Stevenson v. Mayor, etc., of London* (1874), L.R. 10 Q.B. 81, Quain, J., at p. 85, says: "Now, the rule of construction in such cases is, that the trustees take estates co-extensive with the trusts they have to perform." See also *Plenty v. West* (1848), 6 C.B. 201; also cases cited in Jarman on Wills, 5th ed., pp. 1154-1155.

The word "devolve" used in sec. 8 of the Devolution of Estates Act was held by Ferguson, J., in *In re Booth's Trusts* (1888), 16 O.R. 429, to be used in the sense merely of "passing," and that the meaning of the word is, that where infants are concerned, no real estate which, but for the preceding sections, would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian.

In this case I think that the real estate has come to the executor and executrix by virtue of the direction in the will that the same shall be sold and divided, and the express authority given to them to execute the directions of the testatrix.

In *In re Koch and Wideman* (1894), 25 O.R. 262, it was held that the Devolution of Estates Act and amendments do not interfere with an express power of sale given by a will to executors and extending beyond the periods of vesting prescribed by those Acts. Speaking of the Act, Street, J., at p. 267, says: "There is nothing in it to interfere with the provisions which testators may themselves have made as to the time and manner in which

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their estates are to be dealt with." See also *In re Fletcher's Estates* (1895), 26 O.R. 499; *Mercer v. Neff* (1898), 29 O.R. 680.

The order will therefore be that the vendors have authority to sell the lands independently of the Devolution of Estates Act. No order as to costs.

See, also, Armour on Devolution, pp. 114, 115, and 116.

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[DIVISIONAL COURT.]

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*Mortgage—Interest—Payment—Advances by Agent.*March 10.
March 30.
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C. acted as agent for the plaintiff in investing money for her upon a mortgage, and as agent for the owners of the equity of redemption in collecting the rents of the mortgaged land until July, 1904, after which he collected these rents as agent for the plaintiff, *quid* mortgagee in possession. The rents proving insufficient to pay the plaintiff's interest in full, C. nevertheless remitted to the plaintiff half-yearly the full amount of the interest accrued, making up the deficiency out of his own pocket :—

Held, upon the evidence, that the advances made by C. were not intended to be payments in satisfaction of the plaintiff's claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom, and therefore, that the plaintiff, in proving the amount due upon her mortgage, was entitled, as against a second mortgagee, to include the sums paid by C. for interest out of his own pocket.

Simpson v. Eggington (1855), 10 Ex. 845, followed.

Decision of MEREDITH, J., reversed.

IN a mortgage action, for foreclosure, the usual reference was directed to take the accounts of the plaintiff as mortgagee. The Master in Ordinary, pursuant to the reference, made a report, the reasons for which he put in writing as follows :—

MARCH 10. THE MASTER IN ORDINARY :—Some of the doctrines of the law of accord and satisfaction are applicable to this case.

Tersely stated, "accord" means an agreement whereby one party agrees to accept a consideration for another's liability different from that which could be claimable under the contractual or other liability of such other party; and "satisfaction" is the execution of such an agreement.

In this case the plaintiff-mortgagee, who resides in Ireland, has received from her agent in Toronto interest on her mortgage made up of collections of rents of the mortgaged premises received by the same person (Mr. Cayley) as agent for the owners of the equity of redemption, and moneys advanced by himself and remitted to the plaintiff, up to the last October. The second mortgagee claims that such advances, or payments, by the plaintiff's agent discharge the mortgaged property from the charge of interest to that date enforceable under the covenants in the plaintiff's mortgage.

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In 2 Co. Litt., p. 43, it is stated: "If any stranger, in the name of the mortgagor or his heir (without his consent or privity), tender the (mortgage) money, and the mortgagee accepteth it, this is a good satisfaction, and the mortgagor or his heir agreeing thereunto may re-enter into the land. But the mortgagor or his heir may disagree thereto if he will."

And in *Grymes v. Blofield* (1593), Cro. Eliz. 541, it was held that where the consideration is paid by a stranger, a plea of payment is not good, for such stranger is not privy to the condition of the obligation.

But the doctrine is governed by the rule that where such stranger or third party intervenes, it must be shewn that he has done so either on behalf of the debtor or that it was intended by such stranger or third party and the creditor, to operate as a discharge of the debtor.

Thus in *Simpson v. Egginton* (1855), 10 Ex. 845, Parke, B., said that the general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise, had been fully considered in the cases he then cited, adding: "The result appears to be, that it is not sufficient to discharge a debtor unless it (the payment) is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification." See further *Kemp v. Balls* (1854), 10 Ex. 607, and *James v. Isaacs* (1852), 12 C.B. 791.

So in *Thurman v. Wild* (1840), 11 A. & E. 453, which was an action for a trespass, Lord Denman, C.J., stated (p. 461) that "accord and satisfaction will operate according to their true principle, which is the consent of the plaintiff."

And in the case of *Williamson v. Goold* (1823), 1 Bing. 171, relied upon by the second mortgagee, in which the payments had been made by parties called "trustees" or "receivers," and on which payments they had charged their commission, or as stated in *Carroll v. Goold* (1823), 1 Bing. 190, 193, "a voluntary advance . . . on account of the annuity, for the benefit of the commission of two-and-a-half per cent.," Dallas, C.J., pointed out the difference between that case and *Butt v. Conant* (1821), 3 Brod. & B. 3 (where the costs of a libel action had been paid by the Treasury), by saying (p. 177): "This is not the case of

a stranger but of an agent standing as it were in the midst of the several parties, and accountable to all. This, therefore, disposes of the case of *Butt v. Conant*, and of all other cases in which the payment in question was not made by an agent of the party."

So in our own Courts, Draper, C.J., in *Cuthbert v. Street* (1859), 9 C.P. 115, intimated, after reviewing the cases, that a plea alleging that the plaintiff had accepted a sum of money from one Rowe in satisfaction of a breach of his (Rowe's) covenant and that such payment operated as a satisfaction of such breach, would be held to be bad; for Rowe might have stipulated that the plaintiff should bring this action for his indemnity. But, as the plea went further and averred that "the plaintiff accepted and received the same (payment from Rowe) in full satisfaction and discharge of his said damage, and of all causes of action in respect thereof, and exonerated and discharged the defendants therefrom," he held that the plea was good. And in *Lynch v. Wilson* (1862), 22 U.C.R. 226, a somewhat similar plea was held on demurrer to entitle the defendant to judgment.

But, as there are no pleadings here, the question must be determined by the evidence. It is proved that the advances or payments made on account of interest were not made by Mr. Cayley as the agent, or on behalf, of the mortgagor or of the owners of the equity of redemption; and there is no evidence that the plaintiff was aware of the sources from whence the sums she from time to time received as interest came, or that she deliberately accepted such sums in full satisfaction and discharge of the covenant to pay interest contained in the mortgage. And therefore, on the authority of the cases referred to, I must hold that the second mortgagee is not entitled to claim that the advances over and above the rents received by Mr. Cayley, as agent of the owners of the equity of redemption, have operated as a discharge of the mortgaged property from the interest covenanted to be paid by the mortgage in this case.

The defendant William Lyttle, the second mortgagee, appealed from the report.

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The appeal was heard by MEREDITH, J., in the Weekly Court, on the 30th March, 1905.

J. H. Denton, for the appellant.

H. T. Beck, for the plaintiff.

MEREDITH, J. (at the close of the argument):—The single question proper for consideration upon this appeal is, whether the interest upon the respondent's mortgage has been paid up to the 15th day of October, 1905; and that as a fact it has been so paid is not questioned; the money was admittedly sent to her from time to time in regular payments of such interest; it was so received by her; and, doubtless, expended by her as such interest duly paid upon her mortgage. It has never, as far as the evidence shews, been even suggested to her that it was not paid in due course by the mortgagor or owner of the equity of redemption, or that any one could have any sort of claim upon it, or that she was in any manner liable to return any part of it. An allegation of any such state of affairs would be a pure fiction, a pure fabrication, entirely out of question; and, it is fair to add, not now made; and, that being so, how is it possible to sustain a ruling that she has not been so paid?

The witness Cayley in effecting the loan was her agent: but he has ever since been the agent of the owners of the equity of redemption for the purposes of altogether managing the mortgaged property for them, including the collecting of all rents and keeping down of the interest on the mortgage. And for all that yet appears the respondent yet knows nothing of the claims now made by Cayley: indeed, when the appellant first made application to pay off the mortgage, it was stated that the interest was paid up to the date named—so stated by Cayley and the solicitor now acting for him, and through him for the respondent, and the negotiations for payment proceeded so far that the mortgage would apparently have been paid off upon that basis—the basis of interest having been fully paid up to the 15th day of October, 1904—but for a claim made by that solicitor for \$20 costs, which the appellant would not pay. The claim now made is an after-thought and the result of the disagreement of the solicitors over the claim for \$20 costs. That, however, will not stand in Cayley's way if he have any

valid claim: but it is material evidence upon that question of fact. His claim now is, that he paid part of the interest out of his own money, that the money he received as agent for the owners of the equity of redemption was not sufficient for the purpose, and that he made up what was lacking out of his own money; but he makes no pretence of it having ever been paid except as interest upon the mortgage—so expressly stated in his communications with the respondent, and so entered in his books; nor does he make any pretence that she was ever informed, or even yet knows, that he in any manner contributed to any of the payments. There is much to shew that he treated them entirely as paid for his principals, the owners of the equity of redemption, and looked to them only to make them good, but that question cannot properly be dealt with now; it is enough that the payments were made, as he still admits, in satisfaction of the interest, and that they were so received and are still so held. To act as if she were a party to, or in any way concurring in, the claim now made, could hardly be honest: so far as the evidence shews, she has always treated the whole payments made exactly alike—as payments made by the owners of the equity of redemption upon the mortgage—and has actually no knowledge yet to the contrary.

Whether, in fact, Cayley so paid any part of his own moneys or not, and if so whether they are to be treated as moneys paid by him for the use of his principals, the owners of the equity of redemption, in whose behalf he actually paid them, and to whom only he charged them, or not, are nice questions, but questions which cannot rightly be considered by this Court now. It may or may not be that Cayley is entitled to be subrogated to the rights of the mortgagee in respect of some portion of the interest paid, but that cannot give him the right to claim that the mortgagee has not been paid. She has: he proves that beyond question; and there is no evidence of any attempt to induce her to alter her position as a paid up mortgagee, in respect of this interest, if she now could.

What Cayley's rights may be can be properly considered only when he has been made a party to this action, or has brought some other action for the purpose of enforcing them, and has so made himself liable to costs: he cannot be permitted

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to fight that battle out behind the mortgagee's skirts, which he is trying to do, and to do, as far as I can see, without her knowledge.

The cases cited have no bearing upon the real question between the parties; they are, of course, very decisive if we make the facts to fit them. The respondent is not denying, no one is denying, that she has been actually paid the interest up to the 15th day of October, 1905.

The appeal must be allowed; the respondent's account must be taken upon the basis of the admitted payments of interest; but this will not, of course, prevent or prejudice any claim Cayley may make in his own behalf in this or in any other action.

The plaintiff appealed from the decision and order of MEREDITH, J., and her appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., ANGLIN and MAGEE, JJ., on the 11th May, 1905.

H. T. Beck, for the plaintiff. As between the plaintiff and the subsequent mortgagee, the remittal of the moneys by Cayley to the plaintiff is not payment. I refer to *Sheldon* on Subrogation, 2nd ed., sec. 245; *Gillett v. Insurance Co. of North America* (1890), 39 Ills. App. 284; *Rindge v. Inhabitants of Coleraine* (1858), 11 Gray (Mass.) 157; *Heritage v. Paine* (1876), 2 Ch. D. 594.

J. H. Denton, for the defendant Lyttle. The money was advanced on the credit of the owners of the equity of redemption, whose agent Cayley was. The plaintiff never knew that she was receiving Cayley's money. I rely on *Williamson v. Goold*, 1 Bing. 171, and *Carroll v. Goold*, *ib.* 190; *Brice v. Watkins* (1878), 30 La. 21; *Walter v. James* (1871), L.R. 6 Ex. 124.

Beck, in reply, referred to *Simpson v. Eggington*, 10 Ex. 845.

May 27. ANGLIN, J.:—The plaintiff, who resides in Ireland, is first mortgagee of property in the city of Toronto, upon which the defendant Lyttle holds a second mortgage. Mr. Frank Cayley acted as agent for Miss Glascott (the plaintiff) in in-

vesting her money upon a mortgage of this property. He also acted as agent for the owners of the equity of redemption in collecting the rentals of the property, until July, 1904. Since that time he has collected these rentals as agent for the plaintiff, *quod* mortgagee in possession. The rentals received proving insufficient, after satisfying such charges upon them as taxes, outlay for repairs, etc., to pay the plaintiff's interest in full, Mr. Cayley from time to time advanced out of his own moneys the sums required to make up the deficiency. Thus he remitted to Miss Glascott half-yearly the full amount of the interest accrued upon her mortgage during the previous six months. These advances made by Mr. Cayley totalled between \$150 and \$300. The plaintiff claims that this amount is still due and owing as arrears of interest upon her mortgage; the defendant insists that Mr. Cayley's payments satisfied and extinguished the plaintiff's claim for interest, and that only the principal moneys are outstanding.

Upon the taking of the mortgagee's accounts the learned Master's finding is in these terms:—

"It is proved that the advances or payments made on account of interest were not made by Mr. Cayley as the agent, or on behalf, of the mortgagor or of the owners of the equity of redemption; and there is no evidence that the plaintiff was aware of the sources from whence the sums she from time to time received as interest came, or that she deliberately accepted such sums in full satisfaction and discharge of the covenant to pay interest contained in the mortgage. And therefore, on the authority of the cases referred to, I must hold that the second mortgagee is not entitled to claim that the advances over and above the rents received by Mr. Cayley, as agent of the owners of the equity of redemption, have operated as a discharge of the mortgaged property from the interest covenanted to be paid by the mortgage in this case."

Upon appeal, Meredith, J., in Weekly Court, reversed this finding and referred his report back to the Master "to take the account therein on the basis that the interest on the mortgage held by the plaintiff is paid up to the 15th October, 1904." Reasons for allowing this appeal were not given in writing, judgment upon it not having being reserved.

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I have very carefully perused and considered the evidence adduced before the learned Master, and with great respect for the learned Judge who reversed the original finding, I am unable to agree with his conclusion. Although a witness easily led by cross-examining counsel to make admissions which at first blush appear to be damaging, Mr. Cayley, whenever questioned directly, persists in his statement that the advances were made as loans by him and on his own account to the plaintiff, and in no sense as payment for or on behalf of the owners of the equity of redemption; and, upon careful analysis, the very admissions into which he is drawn are seen to be indirect and inconclusive. Mr. Cayley's credibility is unquestioned. It is, moreover, highly improbable that he ever intended to put himself in a position such that he would be obliged to look, in order to recoup himself, to rents presently inadequate to meet the charges upon them, or to the personal liability of the owners of the equity of redemption, to whom he is said to have alluded as objects of charity.

The loose verbal statements attributed to Mr. Cayley by Messrs. Johnston and Black are of the very slightest importance.

The testimony supporting the Master's finding that the advances made by Mr. Cayley were never intended to be payments in satisfaction of her claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom, I am unable to understand upon what principle Miss Glascott's present demand can be rejected. The facts do not bring the present case within *Williamson v. Goold*, 1 Bing. 171, and *Carroll v. Goold*, 1 Bing. 190, so much relied upon by Mr. Denton. There the circumstances pointed clearly to payment in satisfaction being intended by the person who made it. The decision of the Court of Exchequer in *Simpson v. Eggington*, 10 Ex. 845, seems conclusive in favour of the plaintiff.

The appeal should, in my opinion, be allowed with costs here and below.

FALCONBRIDGE, C.J.:—I concur.

MAGEE, J.:—I concur. The key to Mr. Cayley's evidence is found in his answers to the learned Master:—"If the account

was overdrawn, of course I looked to the Raes for it. Q. For yourself or Miss Glascott? A. For Miss Glascott, sir." It is evidently in this sense that he used certain expressions relied on by the respondent. He does not appear to have charged his remittances of interest in his account of rent collections with Mrs. Rae, but rendered to her separate statements shewing the interest accrued on the mortgage, and crediting thereon the balance shewn in his hands on the rent account. It is to be noted that the respondent is not the debtor or principal, but a subsequent mortgagee, and he could hardly adopt or ratify a payment by a third party for the benefit, as the respondent alleges, of the owners of the equity of redemption. *Walter v. James*, L.R. 6 Ex. 124, cited for the respondent, is really an authority that before such adoption or ratification, the receiver and payer of the money could "cancel what had taken place between them." Here the plaintiff and Mr. Cayley both take that attitude. I do not see that actual repayment is necessary to such a cancellation.

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[IN CHAMBERS.]

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July 14.

IN RE DEY v. MCGILL.

Division Courts—Action against an Executor de son tort—Jurisdiction—Prohibition—R.S.O. 1897, ch. 60, sec. 72 (d).

An executor *de son tort* is not within the meaning of R.S.O. 1897, ch. 60, sec. 72 (d), giving enlarged jurisdiction to Division Courts 'when the amount is ascertained by the signature of . . . the person whom, as executor or administrator, the defendant represents,' and a Division Court has no power in the same proceeding to declare a defendant executor *de son tort* and pronounce judgment against him as such for the amount claimed.

THIS was a motion for prohibition to the fourth division court of the county of Simcoe under the circumstances stated in the judgment. The motion was argued on June 30th, 1905, before FALCONBRIDGE, C.J.C.P., in Chambers.

G. Grant, for the defendant, contended that an executor or administrator within the meaning of R.S.O. 1897, ch. 60, sec. 72 (d), must be appointed by the Court: *Grant v. McDonald* (1860), 8 Gr. 468, 477. He also referred to *Yardley v. Arnold* (1842), 10 M. & W. 141.

N. B. Gash, for the plaintiff, *contra*, referred to *Coote v. Whittington* (1873), L.R. 16 Eq. 534; *In re Long Point Company v. Anderson* (1891), 18 A.R. 401; Williams on Executors, 9th ed., vol. 1. p. 217; Kingsford on Executors, secs. 55, 56, 179.

Grant, in reply, referred to Bicknell & Seager's Division Courts Act, 2nd ed., p. 364; Kingsford on Executors, p. 56, sec. 180; 4 Edw. VII., ch. 12, sec. 1 (O.).

July 14. FALCONBRIDGE, C.J.:—Motion for prohibition to fourth division court of the county of Simcoe.

The claim as sued on is as follows :

"In the fourth division court of the county of Simcoe.

Between R. S. Dey, plaintiff, and Robert McGill and Albert Rentner, executors *de son tort* of the estate of Hugh Milloy of the township of Nottawasaga, in the county of Simcoe, deceased, defendants.

The plaintiff claims from the defendants the sum of \$165.97, being the amount due him from the estate of the said Hugh Milloy. The following are the particulars :

1902.

Jan. 18. To amount of account rendered.....	\$64 57	
Mar. 30. " setting 4 shoes 50c. ; cash lent 50c. .	1 00	
use of mower and sleigh.....	5 00	
		\$70 57

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Oct. 17. To amount of loan to the said deceased	17 00	
interest thereon to date at 6%...	1 53	
Oct. 26. " amount of loan to the said deceased	30 00	
interest thereon to date at 6%...	2 60	
		51 13

1904.

Oct. 1. To amount of promissory note, dated		
Oct. 1st, 1904, made by the deceased, payable in 3 months from date thereof to the plaintiff, with interest at 10%.....	15 50	
interest thereon to date at 10%..	0 77	

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Feb. 7. To amount of promissory note, dated		
7th Feb., 1905, made by the deceased, payable to the plaintiff on on 1st of April, 1905, with interest at 10% per annum after maturity.	28 00	44 27
Total.....		\$165 97

And interest thereon till date of judgment.

And the plaintiff claims to recover judgment against the said Robert McGill and Albert Rentner for wrongfully interfering with and selling and otherwise converting the chattels and effects of the said Hugh Milloy, deceased."

The learned Judge held that defendants had so intermeddled with the estate of deceased as to render them liable as executors *de son tort*. And although they did this with good intent and at the request of the widow of deceased, no fault can be found with this part of the judgment.

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The amount sued for brings the case within the enlarged jurisdiction of the Division Court, and under the provisions of sec. 72 of the Division Courts Act (R.S.O. 1897, ch. 60), and a question arises, under sub-sec. (d), . . . "where the amount or original amount of the claim is ascertained by the signature of the defendant, or of the person whom, as executor or administrator, the defendant represents."

Can the defendants be said to represent the deceased until they have been declared by the Court to be executors? Is it the intention of the statute that in one and the same proceeding the declaration is to be made which alone can make a defendant liable, and before that point is reached the defendant is to be clothed in advance with the representative character so as to confer jurisdiction on the Court to make the declaration and pronounce the judgment against him? I think not.

The point is, so far as I know, new, and it does not seem to have been taken below, so while I order prohibition, it will be without costs.

A. H. F. L.

[DIVISIONAL COURT.]

DOULL V. DOELLE.

THE COMMERCIAL TRAVELLERS' ASSOCIATION, GARNISHEES.

D. C.
1905Feb. 7.
March 11.
May 27.

Husband and Wife—Judgment Against Separate Estate of Married Woman—Proceeds of Life Policy Payable to Her—Separate Estate—Garnishment—R.S.O. 1897, ch. 203, sec. 159—R.S.O. 1897, ch. 163, sec. 4.

The plaintiff was a judgment creditor of the defendant, by virtue of a judgment payable out of her separate estate, recovered on bills of exchange accepted by the defendant, a married woman engaged in trade, for her trade debts, subsequent to 13th April, 1897.

Afterwards on the death of her husband, she became entitled to the proceeds of a policy of insurance on his life, which he had made payable to her as beneficiary :—

Held, that the effect of sec. 159 of ch. 203 R.S.O. 1897 is to create a statutory trust of the money, payable under the policy, in favour of the wife without restraint on anticipation; that on the death of her husband, the absolute right to the money became vested in her, her original interest in the trust being separate property within the contemplation of The Married Woman's Property Act, R.S.O. 1897, ch. 163, and that the fruits of the trust must be regarded as separate property and as such liable to satisfy the plaintiff's judgment.

THIS was an appeal from the judgment of Street, J., who had dismissed an appeal from the Master in Chambers ordering the garnishees to pay to the plaintiff, a judgment creditor, certain moneys due by them to the defendant, the judgment debtor, under a policy of insurance on her deceased husband's life effected by him and made payable on its face to her.

The other facts appear in the judgment of Street, J.

The application by the plaintiff for an order, directing the garnishees to pay over the proceeds of the policy, was argued on the 31st of January, 1905, before Mr. Cartwright, the Master in Chambers.

F. J. Roche, for the motion.

W. E. Middleton, contra.

February 7. THE MASTER IN CHAMBERS :—This is a motion to make absolute an attaching order herein.

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The money attached is in the hands of the Commercial Travellers' Association of Canada. It is proceeds of a policy on the life of the defendant's husband which was payable to her.

Judgment was signed against the defendant on the 11th April, 1899, on certain bills of exchange accepted by her during coverture, and all of them drawn and accepted subsequent to 60 Vict. ch. 22 (O.).

By that judgment, the plaintiff was declared to be entitled to recover \$1,310.51 from defendant "*payable out of her separate estate.*"

In *Softlaw v. Welch* (1899), 2 Q.B. 419, at p. 427, Vaughan Williams, L.J., said, "The *Scott v. Morley* form is the right form of judgment whenever the action is brought on a contract made by a married woman during coverture;" and A. L. Smith, L.J., said, "The fact of a married woman becoming discovert does not, *apart from the provisions of the Act of 1893*, (from which the Ontario Act of 1897 is copied) extend her liability upon contracts made by her during coverture." It was contended for the defendant that the judgment must be followed strictly and could not be held to bind after acquired property.

It seems, however, to follow from what was said in *Softlaw v. Welch* (*supra*), that this argument cannot be sustained.

The judgment as entered was the only possible judgment. But in the subsequent events, which have happened, the words of the statute apply, so that the judgment is now enforceable by process of law "against (this as well as) all property, which she may thereafter while discovert possess or be entitled to."

It is just as if the sheriff, under an execution in the words of this judgment, had seized a quantity of valuable jewellery recently left by will to the defendant. Could the defendant prevent this being done?

The motion should, therefore, be granted with costs—those of the garnishees to be paid by plaintiff and added to his claim against defendant.

From this judgment the defendant appealed and the appeal was argued on the 21st of February, 1905, before STREET, J.

W. E. Middleton, for the appeal.

F. J. Roche, contra.

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March 11. STREET, J. :—Appeal by the defendant from an order made by the Master in Chambers in a garnishee proceeding ordering the garnishees to pay to the judgment creditor money due by them to the defendant.

The action was brought against the defendant as a married woman engaged in trade, upon certain bills of exchange accepted by her for certain of her trade debts, after the passing of 60 Vict. ch. 22 (O.) assented to on 13th April, 1897.

On 11th April, 1899, judgment under Rule 603 upon an order of the Master in Chambers was entered in the action against the defendant, as a married woman, for \$1,310.51, "payable out of her separate estate."

The papers before me and the admission of counsel shew, that the husband of the defendant in his lifetime effected an insurance with the garnishees, The Commercial Travellers' Association, for the sum of \$510, and that the amount was made payable at his request upon the face of the policy to his wife, the defendant.

After the recovery of the judgment, the husband died and the money payable under the policy became payable to the defendant, under the terms of the direction so given by the husband.

The plaintiff obtained an order under the garnishee rules for the payment by the Commercial Travellers' Association to them of the insurance money; and the defendant appeals upon the ground, that the proceeds of the policy were never owned by the defendant during her husband's lifetime, but only came to her at his death, and that therefore they can not be considered as "separate estate:" that by the terms of the judgment obtained by the plaintiff, the operation of it is confined to her separate estate, and that therefore the money in question cannot be seized.

I think I must hold upon the evidence before me, that the debt, upon which the judgment was recovered, was contracted

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after the date of the passing of the Married Women's Property Act of 1897, on 13th April, 1897, and that the rights of the parties are governed by the 4th sec. of the Act, ch. 163 R.S.O. 1897.

The plaintiff was entitled to a judgment payable not only out of the separate property of the wife, but also out of any property which she might after the date of the contract sued on, while discoverd, be possessed of or entitled to, with the additions and subject to the exceptions contained in the 21st sec. of the Act, and in sub-sec. 2 of sec. 4 of the Act. See *Barnett v. Howard*, [1900] 2 Q.B. 784

The difficulty here is caused by the fact, that the order of the Master in Chambers and the judgment following it adjudge "that the plaintiff recover against the defendant (a married woman) \$1,310.51, payable out of her separate estate with the costs of this action and motion to be taxed," and does not make it recoverable out of anything else. If the judgment had been in the form to which the plaintiff was entitled, there could not have been any question raised here: as it is, the plaintiff seems only entitled to retain his order, if he can establish that the proceeds of this policy were separate estate.

In my opinion I should hold that the money here in question is separate estate.

It is perfectly true, that apart from the provisions of our Insurance Act with regard to insurances effected for the benefit of wives and children, it could not have been contended, that money coming to a widow under a policy of insurance upon her husband's life, of which he had made her the beneficiary, was separate estate, because from its own nature it was not property belonging to her during coverture.

Under the 159th sec. of ch. 203 R.S.O. 1897, however, the naming of the wife as a beneficiary in a policy or by endorsement or other writing creates a trust in her favour of the amount secured by the policy, and leaves the assured no further right of disposition over it, beyond a right which is in effect a right of revocation and new appointment, limited however strictly to certain objects.

The effect of what the defendant's husband did therefore was, to create a trust in her favour of the amount secured by this policy : it is true, he might have revoked it and declared a new trust in favour of children, if he had them ; but he never did in fact revoke the original trust in her favour, and the right so created and vested in her must, I think, be treated as separate estate.

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The defendant strongly relied upon *King v. Lucas* (1883), 23 Ch. D. 712, at p. 724, and *In re Shakespear, Deacon v. Larkin* (1885), 30 Ch. D. 169, at p. 171, as supporting the alleged general proposition, that an insurance policy, in favour of a wife upon the life of her husband, could never be separate estate, because nothing could be realized from it during her coverture.

An examination of these authorities, however, shews no support to that general proposition. Both cases turned upon the particular terms of the settlement upon the wife of policies upon the life of the husband ; and it was held in each case, that because of the terms of the settlement, the interest of the wife, which was declared to be for her separate use by the settlement, was the income to be derived from the proceeds of these policies, there could be no separate use during that coverture.

The distinction is clearly pointed out by Cotton, L.J., in the course of the argument of *King v. Lucas*, 23 Ch. D. at p. 723 : he says : " No doubt a reversionary interest may be settled to a married woman's separate use. The question is whether, upon the true construction of this settlement, it was intended thereby to give her any separate estate till after the death of her present husband."

If in those cases, therefore, the policy itself instead of only the income derived from the proceeds of it had been settled to the separate use of the wife, the result would have been different.

In my opinion, there was a valid trust of this policy created by the statute in favour of the wife when it was issued, and the policy and its proceeds were separate estate within the meaning of the Act, ch. 163 R.S.O. 1897, and were properly seized under the judgment herein.

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From this judgment the defendant appealed to a Divisional Court and the appeal was argued on the 11th of March, 1905, before MEREDITH, C.J.C.P., TEETZEL and CLUTE, JJ.

W. E. Middleton, for the appeal. The judgment is here against the defendant's separate property *only*. The cases establish that property acquired by a woman after her coverture is determined by her husband's death is not separate property: *Lush's Law of Husband and Wife*, 2nd ed., pp. 313, 314. The defendant did not acquire any title to the insurance money until her husband's death. Before that, her right was a mere *spes successionis* dependent upon the failure of her husband by will or other instrument to vary the appointment. The trust declared by the statute is really for the benefit of the whole class of preferred beneficiaries. And at any rate the wife's interest during her husband's lifetime is not "property:" *In re Parsons, Stockley v. Parsons* (1890), 45 Ch. D. 51; R.S.O. 1897, ch. 203, sec. 159; R.S.O. 1897, ch. 163, sec. 2; *King v. Lucas*, 23 Ch. D. 712; *In re Shakespear, Deacon v. Larkin*, 30 Ch. D. 169. The plaintiff's rights are measured by the form of the judgment and R.S.O. 1897, ch. 163, sec. 4 (c),* when the judgment is in this form and cannot be applied in such a case as this, where

*(4) 1. Every contract entered into by a married woman on or after the 13th day of April, 1897, otherwise than as an agent :

- (a) Shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract, and it shall not be necessary in any proceeding to prove that she had any separate property at the time when such contract was entered into, or subsequently.
 - (b) Shall bind all separate property which she may at the time or thereafter possess or be entitled to ; and
 - (c) Shall also be enforceable by process of law against all property which she may thereafter while discover possess or be entitled to.
2. Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which she is restrained from anticipating.

the debt arose before the statute the notes sued on being renewed: *In re Wheeler, Hankinson v. Hayter*, [1904] 2 Ch. 66.

F. J. Roche, contra. The judgment may be amended, but that is not necessary. The judgment here must be read with the Married Woman's Property Act, R.S.O. ch. 163, which was passed on the 13th April, 1897. Clause (c) sec. 4, reaches "all property." The policy created a trust in favour of the beneficiary. The cases cited for the defendant do not apply, as they turned on the special words of the settlements.

Middleton, in reply, cited *Beckett v. Tasker* (1887), 19 Q.B.D. 7, and *Pelton Brothers v. Harrison*, [1891] 2 Q.B. 422.

May 27. TEETZEL, J.:—After a careful perusal of all the authorities cited and many others, I can find no reason for disturbing the judgment appealed from.

The judgment debtor was named as sole beneficiary in the contract of insurance upon the life of her husband, and section 159 (1) of ch. 203, R.S.O. 1897, in such cases enacts that "such contract shall (subject to the right of the assured to apportion or alter as hereinafter enacted) create a trust in favour of the said beneficiary or beneficiaries, according to the intent so expressed or declared, and so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured," etc.

The effect of this section is, therefore, to create a statutory trust of the moneys payable by the policy, in favour of the wife without restraint on anticipation, but subject to be defeated upon the happening of either of two contingencies: (1) The wife pre-deceasing the husband; (2) The revocation of her appointment as beneficiary and appointment of a child or children in her place, as beneficiaries under section 160 of the Insurance Act.

Neither of these contingencies happened and upon the death of the husband, the absolute right to the money became vested in the wife. Her original interest in the trust would, I think, be separate property within the contemplation of "The Married Woman's Property Act," and it necessarily follows that the

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fruits of the trust must also be regarded as separate property, and as such liable to satisfy the judgment in question.

The appeal will be dismissed with costs.

MEREDITH, C.J., and CLUTE, J., concurred.

The following form of judgment against a married woman in respect of her separate estate is now in use in the High Court of Justice.

FORM OF JUDGMENT AGAINST MARRIED WOMAN.

It is adjudged that the plaintiff do recover against the defendant the sum of \$ and costs to be taxed, such sum and costs to be payable out of her property hereinafter mentioned and not otherwise: and it is ordered that execution herein be limited to the separate property of the said defendant not subject to any restriction against anticipation, unless such property shall be liable to execution notwithstanding such restriction: and to such property as she may hereafter while *discouvert* possess or be entitled to and not theretofore subject to any restriction against anticipation as aforesaid.

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[IN THE COURT OF APPEAL.]

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June 29.

Railways—Gross Negligence—Gratuitous Passenger—Consideration—Free Pass—Liability—Limitation of Actions—“By Reason of the Railway.”

The plaintiff brought an action for damages for injuries received in an accident while travelling on an unconditional free pass upon the defendants' railway. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' line managed by the defendants' servants:—

Held, that this being *prima facie* evidence of negligence, and even of gross negligence, if such were necessary, as to which *quære*—the plaintiff was entitled to recover.

Held, also, that although brought more than six months after the happening of the accident, the action was not barred under the limitation clause of the General Railway Act, R.S.O. 1897, ch. 207, sec. 42, incorporated into the defendants' special Act—because it was based on the defendants' breach of their common law duty, founded on their undertaking to carry the plaintiff safely, and not on injury sustained “by reason of the railway” within the meaning of that clause.

Semble, that the words “may prove that the same was done in pursuance of and by authority of this Act and the Special Act” in the latter part of R.S.O. 1897, ch. 207, sec. 42 (1), mean no more than “may prove that the damage or injury was sustained by reason of the railway,” as in the earlier part of the section.

THIS was an appeal by the defendants from the judgment of Meredith, C.J.C.P., before whom the case was tried, without a jury, on March 30th, 1904, at Hamilton. The appeal was argued on January 10th, 1905, before Moss, C.J.O., and OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A.

J. W. Nesbitt, K.C., for the defendants, contended that as the plaintiff was travelling on a pass, the defendants were only liable for gross negligence, of which the mere fact that a collision occurred was not evidence: *Moffatt v. Bateman* (1869), L.R. 3 P.C. 115; *Nightingale v. Union Colliery Co.* (1904), 35 S.C.R. 65; *Harris v. Perry & Co.*, [1903] 2 K.B. 219, at p. 226; *City of Kingston v. Drennan* (1897), 27 S.C.R. 46, 60; that the plaintiff had failed to shew affirmative evidence of gross negligence, which she was bound to do; and that at any rate the action was not brought within the six months' limit of time allowed: 55 Vict. ch. 95, sec. 2 (O.); R.S.O. 1897, ch. 207, sec. 42; *Kelly v. Ottawa Street R.W. Co.* (1879), 3 A.R. 616; *Broune v. Brockville and Ottawa R.W. Co.* (1860), 20

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U.C.R. 202; *Auger v. Ontario Simcoe and Huron Railroad* (1859), 9 C.P. 164; *McCallum v. Grand Trunk R.W. Co.* (1871), 31 U.C.R. 527; *Zimmer v. Grand Trunk R.W. Co.* (1892), 19 A.R. 693, 702; *McArthur v. Northern and Pacific Junction R.W. Co.* (1890), 17 A.R. 86, 117; *May v. Ontario & Quebec R.W. Co.* (1885), 10 O.R. 70, 77; *North Shore R.W. Co. v. McWillie* (1890), 17 S.C.R. 511; that this was a case of tort, not of contract: *Foulkes v. Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157, 165; *Tebbutt v. Bristol & Exeter R.W. Co.* (1870), L.R. 6 Q.B. 73.

A. M. Lewis, for the plaintiff, contended that a head-on collision, such as occurred here, is *prima facie* evidence of negligence; that the action was founded on contract; but that even if looked on as an action of tort, it does not come within the words "by reason of the railway," in the limitation clause: *Roberts v. Great Eastern Railway Co.* (1856), 13 U.C.R. 615; *Kelly v. Ottawa Street Railway Co.*, 3 A.R. 616, at pp. 618, 620-1; *Allison v. Canadian Pacific R.W. Co.* (1889-90), 17 O.R. 747, 17 A.R. 480; that in *Conger v. Grand Trunk R.W. Co.* (1887), 13 O.R. 160, there was negligence in the operation of the railway itself, which distinguishes the case; that damage to be "by reason of the railway," must be by reason of negligence in the construction or maintenance of the railway; that the payment of fare is not necessary to the creation of a contract, and once there is a contract to carry as a passenger, there is a contract to carry safely: *Smith on Negligence*, 2nd ed., p. 180. He also cited *Alton v. Midland R.W. Co.* (1865), 19 C.B.N.S. 213; *Great Northern R.W. Co. v. Harrison* (1854), 10 Exch. 376; *Abbott on Railways*, at pp. 266, 269; *Beven on Negligence*, 1st ed., p. 639.

Nesbitt, in reply, referred to *McCawley v. Furness R.W. Co.* (1872), L.R. 8 Q.B. 57; *Gallin v. London and North Western R.W. Co.* (1875), L.R. 10 Q.B. 212.

June 29. The judgment of the Court was delivered by OSLER, J. A.:—This was an appeal by the defendants from the judgment at the trial before Meredith, C. J., without a jury.

The facts were that on June 25th, 1903, the plaintiff, who was the wife of a servant of the company, was travelling

in one of their cars in which she had been accepted as a passenger under an unconditional free pass which had been given to her two or three days before. While the car was proceeding towards Hamilton, it collided with a freight car of the defendants proceeding on the same track in the opposite direction, and the plaintiff was thereby severely injured. On the following day, while she was still in a nervous and shaken condition and in considerable pain, and before the full extent of her injuries had developed or was known either to the plaintiff or to the company's medical officer, who had been sent to attend to her, and at the request of this officer and of another agent of the company, she signed a release under seal of all claims against them in consideration of \$25. She was told that her injuries were slight, that she would probably be all right in a few days, that the collision was accidental, and that the company would not be liable for anything, but would give her \$25 as a gratuity and pay her doctor's bill. Instead, however, of making a rapid recovery the plaintiff quickly grew worse. She was obliged to go into hospital; three operations, one of them a severe one, became necessary, a miscarriage occurred, and she had not recovered her usual health at the date of the trial on March 30th, 1904. There was evidence, though not medical evidence, that all the plaintiff's sufferings had resulted from or were the consequence of the accident, nor indeed was this seriously disputed by the defendants either at the trial where they called no witnesses, or on the argument of the appeal. A few days after the execution of the release when the plaintiff found she was getting worse she wrote to the doctor to say so, and that she would expect the company to stand good for the injuries.

The action was brought on February 15th, 1904.

The defendants contended that as the plaintiff was a gratuitous passenger they were liable, if at all, only for gross negligence, of which they said there was no evidence, and they pleaded the six months' limitation clause of the R.S.O. 1897, ch. 207, sec. 42, which (or its predecessor) is by reference part of their private Act, and the release. The learned trial Judge held that the limitation clause did not apply to the cause of action sued for, and gave judgment for the plaintiff for \$600,

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less the \$25 paid on the execution of the release, which he set aside as not binding on the plaintiff under the circumstances.

On the argument of the appeal the points taken at the trial were again relied upon by the appellants.

The defendants were common carriers of passengers, and were incorporated by 55 Vict. ch. 95 (O.).

On the question of negligence, the case presented by the only evidence on the record is that of a head-on collision between two cars on the defendants' own line, managed by their own servants. That this is *prima facie* evidence of negligence is established by numerous authorities. *Skinner v. London, Brighton & South Coast R.W. Co.* (1850), 5 Exch. 787; *Ayles v. South Eastern R.W. Co.* (1868), L.R. 3 Exch. 146, 148; *Carpue v. London and Brighton R.W. Co.* (1844), 5 Q.B. 747; and see *Scott v. London and St. Katherine Dock Co.* (1865) 3 H. & C. 596, 601; 6 C.Y.C. (Cyclopædia of Law and Procedure), pp. 631-2, title "Carriers;" *Gleeson v. Virginia Midland Railroad Co.* (1891), 140 U.S. 435.

And in the case of one who is being carried by the company gratuitously, or on a free pass, such a collision must also be evidence of gross negligence since it is evidence of the absence of that reasonable care in the particular business of the conduct and management of a railway which the company owe to a person who is received by them for carriage over their line. In *Austin v. Great Western R.W. Co.* (1867), L.R. 2 Q.B. 442, the plaintiff was an infant above the age at which children were entitled to pass free on the defendants' railway, and suffered some injury in consequence of an accident on the road. It was held, assuming that no fare had been paid by or for him, that the company would be liable independent of contract because he had been accepted as a passenger and that this cast a duty on the company to carry him safely: *Marshall v. York, Newcastle & Berwick R.W. Co.* (1851), 11 C.B. 655; *Foulkes v. Metropolitan District R.W. Co.*, 5 C.P.D. 157. *The Great Northern Railway Co. v. Harrison*, 10 Exch. 376, seems to be also the case of an action at the suit of a gratuitous passenger. In Pollock on Torts, 7th ed., p. 527, the writer says of *Austin's* case, "whether the company is under the same duty towards (such a passenger) in respect of the amount of diligence

required, as towards a passenger with whom there is an actual contract, is not so clear on principle. The point is not discussed in any of the cases now under review."

In *Harris v. Perry & Co.*, [1903] 2 K.B. 219, in the Court of Appeal, the plaintiff, who was the inspector of the defendants' works, had been invited by the defendants' servant to travel to his destination on a locomotive under the management of the latter. The defendants were contractors for making a tube railway. In connection with the works they had constructed a temporary contractors' railway, and the locomotive was used for the purpose of hauling away the excavated material, and was not fitted or intended for the carriage of passengers. In the course of its journey it ran into a truck which was standing on the rails. The Court said it was competent for the jury to find, as they had found "a failure of that ordinary care which is due from a person who undertakes the carriage of another gratuitously. The principle in all cases of this class is that the care exercised must be reasonable, and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and the responsibility accepted in the case of a person who merely receives permission to traverse the property of another and the case where a person is received into the custody of another for transportation." *Lygo v. Newbold* (1854), 9 Exch. 302, 305, and other cases are cited. The case is referred to in Pollock on Torts, 7th ed., p. 513. In a note it is said that the real question was whether there was evidence of invitation, but there is no intimation that it is not well decided on the facts, or inconsistent with authority.

And see *Beal v. The South Devon Railway* (1865), 3 H. & C. 337, 341; *Lord v. Midland Railway Co.* (1867), L.R. 2 C.P. 339, 344; per Willes, J., *Corby v. Hill* (1858), 4 C.B.N.S. 556, 567.

It is manifest that the business of the defendants is one which requires, and in which they hold forth the possession of the degree of skill and diligence necessary for its proper management, and the failure to exert it is the absence of that

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degree of care to which the gratuitous passenger is entitled, in other words is gross negligence whether the cars are propelled by steam or by the not less powerful and dangerous agency of electricity. Sm. L.C., 11th ed., p. 236: "If a man gratuitously undertakes to do anything to the best of his skill when his situation or profession is such as to imply skill, the omission of that skill is imputable to him as gross negligence;" *per* Lord Loughborough in *Shiells v. Blackburne* (1789), 1 H. Bl. 158-162; *Wilson v. Brett* (1843), 11 M. & W. 113, *per* Parke, B.

In *Nolton v. Western Railway Corporation* (1857), 15 N.Y. 444-49 (the case of a mail agent carried without charge), Sheldon, J., quoting the above adds (at pp. 449-50), "I regard this principle as peculiarly applicable to railroad companies, in view of the magnitude of the interests which depend upon the skill of their agents, and of the utter powerlessness of those who trust to that skill to provide for their own security."

In *Philadelphia & Reading Rd. Co. v. Derby* (1852), 14 How. U.S. 466-485, the plaintiff (defendant in error) was, at the invitation of the president of the company, riding on a car engine with him. A collision took place between their engine and another engine of the company running in the opposite direction on the same track. The Court said, at p. 485, "This duty (to carry safely) does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another, is a sufficient legal consideration to create a duty in the performance of it:' see *Coggs v. Bernard*, and cases cited in 1 Sm. L.C. 95." (The passage referred to is probably that which is now found at p. 187 of the 12th ed.). "It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But . . . the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal

safety of the passenger should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the term of 'gross.'"

This doctrine was affirmed by the same Court in the following year in a similar case, "as resting, not only on public policy, but on sound principles of law:" *Steamboat New World v. King* (1853), 16 How. U.S. 469, 474. And see *Fetter on Carriers of Passengers* (1897), vol. 1, section 235; *Waterbury v. New York Central and Hudson River Railroad Co.* (1883) 17 Fed. Rep. 671 and notes; S.C. 21 Blachf. 314 (the case of a drover riding on an engine with consent of the engineer); Redfield on the Law of Railways, 6th ed. (1888), vol. 2, p. 236; Hutchinson on Carriers, 2nd ed. (1891), secs. 55-56-65-67; 5 Am. & Eng. Ency. of Law, 2nd ed., pp. 507-508; C.Y.C. title 'Carriers,' page 544, "One who is accepted for transfer, and taken as a passenger without any compensation is nevertheless entitled to all the care and protection which the carrier is under obligation to furnish to paying passengers."

The defendants relied upon *Moffatt v. Bateman*, L.R. 3 P.C. 115, which is, however, a case very different from the present. It was the case of a person offering another a seat in a carriage he was driving. Such a person, says Lord Chelmsford, at p. 122, "If liable at all . . . could only be so for negligence of a gross description." And after examining the various circumstances relied upon by the plaintiff as proving negligence, he adds, at p. 124, "There is really no evidence whatever of negligence of any description on the part of the appellant."

On the argument something was said as to the accident having happened in consequence of the defendants' telephone line being out of order which prevented them from signalling one of the cars. The evidence, however, discloses nothing of this, and even if the facts were as set forth in the needlessly long statement of claim, the collision was still attributable to the negligence of one or other of the defendants' dispatchers or to their system of dispatching or to sending on one of the cars while the other might not be waiting at a station where they were to pass.

I had written thus far when I noticed the case of *Nightingale v. Union Colliery Co.*, 35 S.C.R. 65, in which *Moffatt v.*

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Bateman is followed, and *Harris v. Perry & Co.*, [1903] 2 K.B. 219, distinguished. In the head note it is said, "In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger." Whether this is intended to be laid down as applicable to the case of a person travelling on a free pass issued by the authority of a railway company part of whose business is the carriage of passengers, and whether such a person is considered to have no other rights than those of a mere licensee does not appear. High authority is not wanting to the contrary of this, but in *Nightingale's* case the deceased had not been travelling as an accepted passenger on a pass, and there were circumstances which probably justified the conclusion that he was a mere licensee. Though the case bears some resemblance in its facts to *Harris v. Perry & Co.*, it is more like that of a person accepting a seat in a private carriage driven by the owner. The Court accordingly held that gross negligence not having been proved it was governed by the rule stated in *Moffatt v. Bateman*, and the principle laid down in *Gautret v. Egerton* (1867), L.R. 2 C.P. 371. However, this may be, we have in the case at bar abundant evidence of gross negligence on the part of the defendants, and are therefore not embarrassed by the decision of the Supreme Court just referred to.

The second question is whether the action is barred by the limitation clause of the general Act, R.S.O. 1897, ch. 207, sec. 42, or its predecessor, R.S.O. 1887, ch. 170, sec. 42, which by sec. 2 of the defendants' special Act, 55 Vict. ch. 95 (1892), (O.) was incorporated therewith, and made part thereof. "All actions for indemnity for damages or injury sustained by reason of the railway shall be instituted within 6 months next after the time of the supposed damage sustained . . . and the defendants may plead 'not guilty by statute' and give this Act and the special Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act and of the special Act."

The question when damage or injury can be said to have been sustained by reason of the railway so as to bring the

claim within this section, or its congeners, has been frequently considered in our courts, but it is not easy to extract any clear or satisfactory rule from the decisions. Burton, J. A., in *Zimmer v. Grand Trunk R.W. Co.*, 19 A.R. 693, at p. 701, thought that the words of the section had received "a far wider interpretation than was ever intended and ought not to be extended." Wilson, C. J., in *May v. Ontario & Quebec R.W. Co.*, 10 O.R. 70, at pp. 77-8, was "not altogether satisfied the language of the section strictly authorized" the interpretation which had been placed upon it. Other Judges have expressed themselves in a similar way and have refined and limited its construction and application. In the present state of the authorities it is to be desired that a clear ruling should be given upon the subject by the Supreme Court, but in the meantime we have only to see whether the present case falls within any decision or the principle of any decision in favour of the view contended for by the defendants, by which we are bound.

I do not think it is necessary to go through all the cases at length. That has been done to some extent by my late brother Rose, J., in *Anderson v. Canadian Pacific R.W. Co.* (1889), 17 O.R. 747, and they are collected in a useful note to *Finlay v. Canadian Pacific R.W. Co.* (1901), 5 Terr. L.R. 143, in McMurchy & Denison's collection of Canadian Railway Cases, vol. 2, p. 380; and in a work by the same writers, "Canadian Railway Act Annotated" (1905) p. 474, *et seq.*; and in the late Mr. Abbott's Railway Law of Canada, p. 266.

To one class of cases it is generally conceded that the section applies, those, namely, in which the damage arises from the execution or neglect in the execution of the powers given to, or assumed by the company for enabling them to construct and maintain their railway: *Brown v. Grand Trunk R.W. Co.* (1865), 24 U.C.R. 350; *Follis v. Port Hope, &c., R.W. Co.* (1857), 9 C.P. 50; *McArthur v. Northern Pacific Junction R.W. Co.*, 17 A.R. 86; *North Shore R.W. Co. v. McWillie*, 17 S.C.R. 511, at p. 514, *per* Gwynne, J. It has also been held to apply to those cases in which in the course of managing the trains upon the railway and by neglect to give proper signals a collision has occurred at a highway crossing, and the plaintiff or

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his property has been injured : *Browne v. Brockville & Ottawa R.W. Co.*, 20 U.C.R. 202, where Robinson, C.J., said, at p. 207, " 'By reason of the railway' is a very comprehensive expression, and we think extends to an injury sustained on the railway by reason of the use made of it." Also to negligently killing horses which had escaped upon the railway track : *Auger v. Ontario, Simcoe & Huron Railroad*, 9 C.P. 164. And to negligently allowing dry wood and leaves to accumulate upon the railway which became ignited by fire dropped without negligence from the defendants' locomotive and the fire spread to the plaintiff's adjoining land. The use of fire it was said, was necessary to carry on the defendants' ordinary business; hence the damage was sustained by reason of the railway : *McCallum v. Grand Trunk R.W. Co.* (in appeal) 31 U.C.R. 527. Hagarty, J., observed at p. 534, "the case may be readily distinguished from others where some direct malfeasance has caused injury, or where contracts express or implied are broken."

And where the plaintiff was injured by jumping into a drain to avoid collision with the defendants' car which was being carelessly driven by the place where he was working, this Court considered that they were following the decisions in 9 C.P. 164 and 20 U.C.R. 202 in holding that the damage was sustained "by reason of the railway" within the meaning of these words in the defendants' special Act: *Kelly v. Ottawa Street R.W. Co.*, 3 A.R. 616. Moss, C.J.O., and Burton, J.A. would have held otherwise had they not considered themselves bound to follow decisions "which had remained so long unchallenged : " p. 618.

In their facts, therefore, it will be seen that none of the classes of cases I have mentioned is like the present and unless the wide meaning which has been given by some of them to the words "by reason of the railway" ought to be extended to it, it is not governed by them.

The words "may prove that the same was done in pursuance of and by authority of this Act and of the special Act" mean no more, in my opinion, than "may prove that the damage or injury was sustained by reason of the railway" as in the earlier part of the section: R.S.O. 1897, ch. 207, sec. 42.

In *May v. Ontario & Quebec R.W. Co.*, 10 O.R. 70, it was, however, held by Wilson, C.J., on demurrer that a workman of the defendants who was injured while being carried to his work on one of the defendants' trains was barred of his action by this section. The learned Chief Justice considered that he was following the cases in holding that damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway" provided it is done in the course and prosecution of their business as a railway company constituted in pursuance of the authority of any statute. But it may be observed that this was not necessary for the decision of the case as it appeared from the statement of claim, as the learned Chief Justice pointed out, that the plaintiff had no cause of action, the negligence charged being that of a fellow servant.

Of *Conger v. Grand Trunk R.W. Co.*, 13 O.R. 160, before O'Connor, J., on demurrer, it need only be said that it is not different in principle from one arising out of a collision at a crossing. The point actually decided, namely, that six months under the Railway Act, and not twelve months under The Fatal Accidents Act was the period of limitation, is probably overruled by *Zimmer v. Grand Trunk R.W. Co.*, 19 A.R. 693. Cf. *Williams v. Mersea Docks & Harbour Board*, [1905] 1 K.B. 804.

In *Auger v. Ontario, Simcoe & Huron Railroad*, 9 C.P. 164, Richards, J., at p. 169, says, "There is no doubt the Courts have held repeatedly that the limitation clauses do not apply where the companies are carrying on the business of common carriers . . . but the liability arises in those cases from the breach of contract, arising from their implied undertaking to carry safely, and to take proper care of the goods, etc." But he held that this principle did not apply to a case like that before him which did not rest in any way on contract, but was strictly an action for a tort for an alleged wrong done by the railway in exercising the powers conferred by the Act. This distinction was acted on in *Anderson v. Canadian Pacific R.W. Co.* (1889), 17 O.R. 747, (an action by a passenger for the loss of her luggage), by Rose, J., and a Divisional Court. The

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decision was affirmed in this Court, though two of the Judges expressed no opinion on the effect of the limitation clause, holding that it was *ultra vires* the Dominion Parliament: *Whitman v. Western Counties R.W. Co.* (1884), 17 N.S. 405 is to the same effect.

In *Prendergast v. Grand Trunk R.W. Co.* (1866), 25 U.C.R. 193, where it appeared that the defendants negligently permitted fire to remain upon the track of their railway near the plaintiff's farm to which it extended and there did damage, it was held that the limitation clause did not apply. The origin of the fire was not shewn though there must have been little doubt that it arose from its use in the defendant's engines. The injury it was said was one at common law by one proprietor of land against an adjoining proprietor for negligently managing a fire supposed to be caused on the land of the latter without his neglect or default.

In *Roberts v. Great Western R.W. Co.* (1856), 13 U.C.R. 615, which was an action by a passenger for injuries sustained in consequence of the car in which he was travelling being thrown off the track by means of defendants' negligence and want of care, Robinson, C.J., delivering the judgment of the Court, said that the section did not apply to an action of that nature but only to actions for damages occasioned by the company in the exercise of powers given or assumed by them to be given for enabling them to construct or maintain their railway; that this was an action charging them with negligence in the conduct of a business that any individual might be engaged in without requiring the aid of legislative Acts enabling them to take and use the property of others against their will. The point actually decided in that case, namely, that the clause did not apply to the case of a passenger injured by the defendants' negligent management of their train, has never that I am aware of been over-ruled or dissented from, unless perhaps in the case of *May v. Ontario & Quebec R.W. Co.*, 10 O.R. 70, by Wilson, C.J., though, no doubt, the opinion expressed as to the meaning of the clause in other respects has not been followed.

If the opinion expressed by Gwynne, J., in *North Shore R.W. Co. v. McWillie*, 17 S.C.R. 511, followed by Richardson, J., in *Findlay v. Canadian Pacific R.W. Co.*, *supra*, had

been the judgment of the Court it would have been unnecessary for me to have referred to the cases so fully as I have done. It appears to be in line with the opinion of Robinson, C. J., in the case last cited, though opposed to that of the Court of Appeal in *McCallum v. Grand Trunk R.W. Co.*, 31 U.C.R. 527. In *North Shore R.W. Co. v. McWillie*, the defendants had run a train too heavily laden on an up-grade against a strong wind, whereby sparks escaped from the locomotive in an unusual quantity and the respondent's barn near the track was set on fire and destroyed. Gwynne, J., held that the damage meant by the section was damage done by the railway itself and not by reason of the default or neglect of the company owning the railway or by reason of the insufficiency in the construction of the engines used, or of negligence in the manner of running them upon the railway. "This latter damage," said the learned Judge, at p. 514, "is no more 'damage sustained by reason of the railway' than damage to goods being carried upon the railway by reason of negligence in the manner of running a train." Ritchie, C.J., and Taschereau and Fournier, JJ., agreed with the Court below that the action was not prescribed, but this seems to have been because the period of limitation was twelve months as provided by their special Act, and not six, as provided by the general Railway Act.

In the case at bar it was strongly urged by Mr. Nesbitt for the defendants that the action did not arise out of a contract of carriage, or out of contract at all; that the damage was caused by the mere tort and negligence of the defendants in running their cars, that it was sustained, in short, by the use made of the railway. It may be conceded that the only consideration for the agreement of the defendants to carry the plaintiff was the trust and confidence she reposed in them when she entrusted herself to their care and that under the old system of pleading the declaration must have been framed in case as for a breach of duty and not in contract. But this, I think, can make no difference. Whether the party was a paying, or a gratuitous passenger the substance of the action is a tort for a misfeasance, an act of positive negligence on the defendants' part: *Taylor v. Manchester, Sheffield & Lincolnshire R.W. Co.* [1895], 1 Q.B. 134, 138. Even when there was a contract of carriage the

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plaintiff might have declared simply as for a breach of duty to carry safely, and the application of the limitation clause cannot depend upon the form in which the plaintiff has chosen or been obliged to bring his action if the facts shew that it arises out of the defendants' breach of duty as carriers. In *Carpue v. London and Brighton R.W. Co.* (1844), 5 Q.B. 747, the plaintiff, a passenger injured by the negligence of the defendants in the course of his journey on their line, sued in case as for neglect of duty to carry him safely. The defendants pleaded that no notice of action had been given as required by section 253 of their special Act, which enacted that no action . . . should be prosecuted against them for anything done or omitted to be done in pursuance of the Act or in the execution of the powers or authorities given by it without twenty days' notice in writing. It was held that no notice of action was necessary, Patteson, J., *arguendo*, observed that no part of the clause pointed to merely doing a thing negligently. The decisions already referred to shew that the right of a passenger by the railway to be carried safely does not depend upon his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely. That is their common law duty founded on their undertaking in the case of the gratuitous passenger as well as the passenger by contract, and here the plaintiff's injury has arisen from the breach of it, or, as was said by the Court in *Carpue's* case, at p. 757, "from their misconduct as carriers, not as proprietors, though in considering the evidence it is impossible to exclude some reference to the actual state of the railway," or, as in the present case, to the management of the train. To such an action the limitation clause does not apply any more than it applies to a common law action for a tort like that of *Prendergast v. Grand Trunk R.W. Co.*, 25 U.C.R. 193, and in thus holding I think we are not going counter to any decided case which was approved of either in *McCallum v. Grand Trunk R.W. Co.*, 31 U.C.R. 527, or *Kelly v. Ottawa Street R.W. Co.*, 3 A.R. 616.

The recent cases of *The Ydun*, [1899] P. 236 and *Lyles v. Southend-on-Sea Corporation* (1905), 21 Times L.R. 389, now reported in [1905] 2 K.B. 1, do not assist the defendants: rather the contrary. What was complained of by the plaintiffs in

those cases, though negligently done, was done by the defendants as public authorities by virtue of an obligation specifically cast upon them by statute or statutory order to perform certain public duties, in the one case to maintain a harbour, and in the other to carry passengers, and, they therefore, were held to be within the protection of the limitation clause of the Public Authorities Protection Act, 1893, 56-57 Vict. ch. 61 (Imp.). In the latter case, *e.g.*, it was said that though defendants acted as carriers and were sued in that capacity yet they did not become carriers by election but by virtue of the obligation cast upon them by statute to do so. *Carpue's case, supra*, and *Palmer v. Grand Junction R.W. Co.* (1839) 4 M. & W. 749, at p. 766, were expressly distinguished on this ground. Here, as in those cases, the defendants are not compelled to become common carriers: their Act "only enables them to be so, so far as they shall think fit, and when they have elected to become so they are liable in that character in the same way that other common carriers are:"* 55 Vict. ch. 95, sec. 3 (O.)

It may be observed that in the Canadian Railway Act, 1903, 3 Edw. VII. ch. 58, sec. 242, the words "by reason of the construction or operation of the railway" have now been substituted for "by reason of the railway," and the period of limitation is extended to one year next after the time when the supposed damage has occurred: but, by sub-sec. (2), nothing in the section shall apply to any action brought against the company upon any breach of contract express or implied in the carriage of any traffic, nor to any action against the company for damages under any section of Part XI. of the Act respecting tolls.

The only remaining question is whether the release should have been set aside. It was hardly attempted to support it, and I think it manifest that under the circumstances it could not have been allowed to stand. A much stronger case was made against it than in the case of *Johnson v. Grand Trunk R.W. Co.* (1894), 21 A.R. 408; *Ellen v. Great Northern R.W. Co.* (1901) 17 Times L.R. 453, may be also referred to.

The appeal should be dismissed with costs.

*See *Lyles v. Southend-on-Sea Corporation*, [1905] 2 K.B. 1, at p. 16.—Rep.

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[STREET, J.]

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Sept. 29.

GIBSON V. LE TEMPS PUBLISHING CO.

Solicitor—Lien—Money Paid into Court as Security for Costs—Priority of Execution Creditor—Stop Order.

Money paid into Court by a plaintiff in an action, as security for costs, is not property "recovered or preserved" by the solicitor for the plaintiff within the meaning of Con. Rule 1129 on which the solicitor's lien for costs will attach as against an execution creditor who has obtained a stop order.

MOTION on behalf of one F. V. Moffett for payment to him of certain costs taxed to him, out of moneys paid into Court by the plaintiff as security for the defendants' costs.

The motion was argued in Weekly Court at Ottawa, on the 27th September, 1905, before STREET, J.

W. H. Barry, for the applicant.

D. J. McDougal, for plaintiff's solicitors.

September 29. STREET, J.:—This motion was resisted by the solicitors for the plaintiff, who claim a lien on the fund for their unpaid costs due them by the plaintiff.

The facts were as follows:

After the pleadings were at issue the plaintiff made due application for an order for the examination of F. V. Moffett for discovery: he successfully resisted the application and it was dismissed with costs. These costs were taxed at \$23.60, and an execution was issued to recover them, but nothing could be realized.

The plaintiff in the meantime proceeded to judgment against the defendants in the action, and judgment was entered for him against them. The plaintiff had paid into Court \$50, by way of security for the defendants' costs, and as soon as he recovered judgment became entitled to have the money in Court paid out to him. A stop order was obtained however by F. V. Moffett to prevent the payment out to the plaintiff, and the present motion is made upon notice to the plaintiff's solicitors for payment out of Court to Moffett of the amount of his costs taxed and of the execution.

The motion is resisted by the plaintiff's solicitors, upon the ground that they have a lien on the fund for their unpaid costs of the action due them by the plaintiff, who is insolvent.

In my opinion this sum in Court is not property "recovered or preserved" by the solicitors for the plaintiff, within the meaning of Con. Rule 1129,* and they have no lien upon it for their costs, and the applicant, F. V. Moffett, having obtained a stop order has acquired a charge upon the fund for the amount of his costs taxed and the costs of the execution and stop order, and is entitled to have these costs paid out to him.

The motion has been opposed by the solicitors in their own interest and the costs of the present motion must be given against the solicitors. These costs I fix at three dollars.

See *In re Wadsworth, Rhodes v. Sugden* (1885), 29 Ch. D. 517.

G. A. B.

*1129.—(1) Where a solicitor has been employed to prosecute or defend any cause, matter or proceeding, it shall be lawful for the Court in which the cause, matter or proceeding has been heard or is pending, or for a Judge thereof, to declare such a solicitor, or his personal representatives to be entitled to a charge upon the property of whatever nature, tenure or kind, recovered or preserved through the instrumentality of such solicitor; and upon such declaration being made, such solicitor, or his personal representatives, shall have a charge upon and against and a right to payment out of the property so recovered or preserved, for the taxed costs, charges and expenses of or in reference to such cause matter or proceeding; and all conveyances and acts done to defeat, or which may operate to defeat, such charge or right shall, unless made to a *bond fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right.

(2) The Court or Judge may make such order for taxation of such costs, charges and expenses and for the raising and payment of the same out of the said property as may seem just; but no such order shall be made where the right to recover payment of such costs, charges and expenses is barred by any Statute of Limitations.

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[IN CHAMBERS.]

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Sept. 23.

Master's Office—Affidavit Verifying Mortgage Account—Right to Cross-examine—
Con. Rules 490-2, 668-9, 683.

Con. Rule 490 whereby a person who has made an affidavit to be used in any action or proceeding other than on production of documents, may be cross-examined thereon, has no application to proceedings in the Master's office; and therefore there is no right under that rule to cross-examine on an affidavit verifying a mortgage account on a reference.

THIS was an appeal from an order of the Master in Chambers vacating an appointment to cross-examine on an affidavit under the circumstances mentioned in the judgment. The appeal was argued before BOYD, C., in Chambers on September 22nd, 1905.

T. Hislop, for the plaintiff, contended that he had the right to cross-examine the mortgagee on his affidavit, and referred to Con. Rules 490-492; *Cast v. Poyser* (1856), 3 Sm. & G. 369, 374; S.C. 26 L.J. Ch. 93; *Wormsley v. Sturt* (1856), 22 Beav. 398; *In re Lord's Estate, Lord v. Lord* (1866), L.R. 2 Eq. 605; *McArthur v. Dudgeon* (1872), L.R. 15 Eq. 102; *Meacham v. Cooper* (1873), L.R. 16 Eq. 102; *Re Curry, Curry v. Curry* (1897), 17 P.R. 379; *Hughes v. Hughes* (1881), 17 C.L.J. 110; Chancery Order 268; English Order 37, Rule 20; 15-16 Vict. ch. 86, sec. 40 (Imp.).

No one *contra*.

September 23. BOYD, C.:—This is a mortgage action which has been referred to the Master. In the course of proceedings the defendant filed an affidavit in that office as required by Rule 693 verifying the mortgage accounts. It is now desired to cross-examine on that affidavit as a matter of right before a special examiner under Rule 490.

That rule has no application to proceedings in the Master's office. It is classed under the heading of "*Evidence on Motions*" and applies to interlocutory or other proceedings in Court or Chambers which are not referred to the Master.

The orders provide all that is required for the conduct of affairs in the Master's office. He is to give the directions and regulate the manner of proceeding in his office under Rule 683. He may direct the examination of parties or of witnesses under Rule 668 and 669 as he may deem expedient. The whole conduct of the reference is committed to him by the Court and it is for him to give directions as to what is to be done and how it is to be done, subject to appeal to the Court. I do not think it is competent for a party under a reference in the Master's office to initiate proceedings for the examination of another party on his affidavit or otherwise before a special examiner without the direction of the Master to that effect, and the order made in Chambers vacating this appointment is one that should be sustained. I therefore affirm it. As no cause was shewn there will be no costs.

See *Garland v. Clarkson* (1905), 9 O.L.R. 281.

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[DIVISIONAL COURT.]

D. C.

1905

THE BULLION MINING CO. V. CARTWRIGHT.

March 27.
Oct. 20.

Promissory Note—Mining Company—Subscription for Stock—Renewal of Note Given therefor—Total Failure of Consideration—Non-liability on Note—Right to Recover back Money Paid.

On the strength of an agreement for the formation of a mining company, setting out its objects and purposes, including the proposed transfer to it by the plaintiff of two mining locations, the defendant subscribed for 60,000 shares of stock in the plaintiff company at 10c. per share, giving two promissory notes therefor of \$3,000 each to the plaintiff company, one of which he duly paid, and the other, after being twice renewed, remained unpaid. The objects and purposes of the company, through no fault of the defendant, were never carried out, and became utterly impracticable; no transfer of the mining locations was ever made, and all expectations of ever successfully carrying out the agreement were abandoned:—

Held, that there was a total failure of consideration, and not only was the defendant not liable on the unpaid note—the fact of its renewal in no way affecting his position—but that he was entitled to recover back the amount he had paid on the other note.

THIS was an action tried before TEETZEL, J., without a jury, at the Toronto sittings on the 27th March, 1905.

The action was brought on a bill of exchange for \$3,046.85, drawn by the plaintiff and accepted by the defendant.

The defendant pleaded an entire failure of consideration; and counterclaimed for \$3,000, paid by the defendant to the plaintiff on 17th September, 1899, to take up a promissory note which had been given by the defendant to the plaintiff, upon the ground that the consideration for which moneys were paid had entirely failed.

The facts are stated in the judgment.

E. Bristol and *Eric N. Armour*, for the plaintiff.

George Bell, for the defendant.

March 27. TEETZEL, J.:—The plaintiff is a mining company incorporated by Ontario Letters Patent, dated 18th February, 1893, one of its purposes and objects being "to buy and sell and to deal in mineral properties and mines," and upon the evidence that appeared to be the chief business carried on by the company.

Among other properties, it owned two mining locations in the vicinity of Rat Portage, known as Locations D 233 and D 389, which were on property adjoining the celebrated Mikado mine; early in 1899 the plaintiff began development work on these two locations, and about the same time suggestions were made to form a subsidiary company for the purpose of acquiring them from the plaintiff company. Whether these suggestions first came from one Rogers, plaintiff's manager, who had been, as early as November, 1897, authorized to sell or otherwise dispose of them with other locations, or from one Walter Macdonald, now deceased, through whom defendant became interested, does not appear quite certain from the evidence. Macdonald was a barrister and solicitor practising in Toronto, one of his partners being a son of the defendant, and the correspondence shews that from the end of 1896 until his death in February, 1900, he was much interested in mining companies in the way of buying and selling stocks, and in organizing and floating mining companies. It was during this period that the frenzied cupidity of the public was being largely "mined" by promoters; and such famous mining properties as "Sawbill," "Hammond Reef," "Hawk Bay," "Mikado," "War Eagle," "Bullion," and scores of other attractive properties enjoyed a brief career of being classed as "gilt-edged investments."

Macdonald had successfully organized the "Hammond Reef" early in 1897, and in March of that year he was authorized by the plaintiff company to sell twenty-five thousand shares of its stock, and through him the defendant became a large holder of stock in the plaintiff company as well as in other mining projects.

As the outcome of several interviews and a lot of correspondence between Rogers and Macdonald on the subject of forming a subsidiary company to acquire said Locations D 233 and D 389, Macdonald on the 15th July, 1899, made a written offer to plaintiff, wherein he proposed that he and one Sproule should undertake the flotation of a company to operate said two locations, to be called "Bullion No. 2 Gold Mining Company of Ontario, Limited." The acceptance of the offer and its leading features as to organization, etc., appear in the following

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D. C. resolutions passed by the plaintiff company on the 3rd August,
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“That the proposition of Mr. Walter Macdonald contained in his letter of July 15th, 1899, *re* the flotation of mining locations, D 233 and D 389, be accepted, and that our manager, Mr. Rogers, be instructed to proceed to carry out the details of the arrangements on the lines suggested and laid down in said letter of July 15th.

“Resolved that in view of the successful mill run of ore from Locations D 233 and D 389, adjoining the Mikado mine, in Shoal Lake District, Lake of the Woods, Ontario, that a joint stock company be formed to work those locations under the name of ‘The Bullion No. 2 Gold Mining Company of Ontario, Limited,’ or such other name as may be finally decided on, such company to have one million shares of one dollar par value each, of which capital stock four hundred thousand shares are to be treasury stock, three hundred thousand shares are to be pooled stock to be held by the Bullion Mining Company of Ontario, Limited, and to be deposited in the Toronto General Trusts Corporation until ample capital is provided for working and equipping the mine by sales of treasury stock, and three hundred thousand shares are to be allotted at the rate of ten cents per share to the promoters of the Bullion No. 2 Gold Mining Company of Ontario, Limited, the amount realized for such shares to be paid for the transfer to the said new company of said locations, and the plant, tools, and machinery thereon. And we hereby authorize our manager, R. Rogers, to close all the details necessary to carry out the above agreement.

“That Walter Macdonald and Robert Karl Sproule be and they are hereby authorized to receive the subscriptions for promoters’ shares in the Bullion No. 2 Gold Mining Company of Ontario, Limited, at ten cents per share, these shares to be pooled in the joint name of D. C. Cameron and Walter Macdonald as trustees, and the proceeds from sale of three hundred thousand of these promoters’ shares to be paid to our company for transfer of Locations D 233 and D 389, and the tools, compressor and other property thereon, as provided by agreement for organization of the said the Bullion No. 2 Gold Mining Company of Ontario, Limited.”

In addition to what appears in the resolutions, the offer contained the stipulation that "the said locations are to be conveyed to the new company when its charter is issued, and with said locations your company is also to transfer the ownership of the compressor plant and all tools and machinery, building lumber, and supplies of any kind that may be on said locations at the time they are taken over, which shall include all such property that now is on said locations, and any that may be taken upon it after this time." The offer also contained a provision that plaintiff company was to have a test made of the ore that was being taken out, and that if the mill, run from such test, shewed a value of \$10 per ton on the plates, the same would be considered satisfactory by Macdonald. The offer also had a further provision, that "from the date of our receiving notice of such mill run, your company shall continue to work the said locations operating on the shafts now being worked, and continuing with the same staff of men, but that after the expiration of fifteen days from the date at which we receive notice of the result of such mill run, all expenditure made by your company shall form a charge on the treasury stock of the new company, and shall be paid to your company out of the first sales of treasury stock. This provision for continuing to work on the said property being necessary in order to cover the period of the organization of the new company without any break."

Pursuant to the above, application was made for a charter of the proposed company. The memorandum of agreement and stock-book was signed by Macdonald and Sproule, and by three directors of plaintiff company, Macdonald and Sproule each subscribing for \$10,000 stock, and each of the other three for \$100,000 stock.

Some question having been raised as to the use of the word "Bullion" in the name of proposed company, the plaintiff company filed with the Provincial Secretary a consent under its corporate seal, in which it is stated: "An arrangement has been made for organization of a company to be called the Bullion No. 2 Mining Company, Limited, with a capital of one million shares of the par value of one dollar each, . . . and as this is a subsidiary company formed to operate D 233 and D 389,

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part of the property of the present Bullion Mining Company of Ontario, Limited, and the formation of the Bullion No. 2 Mining Company, Limited, has been authorized by resolution of the directors of the present Bullion Mining Company of Ontario, Limited, we now consent to the incorporation of the said new company under the name of the Bullion No. 2 Mining Company, Limited." The charter for the Bullion No. 2 Mining Company was issued on the 22nd September, 1899.

As above stated, the defendant had, through Macdonald, acquired a considerable interest in plaintiff company long before the suggestion was made to float the new company, and the correspondence shews that, as a shareholder in plaintiff company, the defendant at first opposed the idea of the new company being formed to acquire the two locations, but the correspondence shews that Macdonald succeeded in convincing him that the new company would not only be an excellent investment in itself, but that from the purchase money which the plaintiff company would receive, very substantial dividends would be paid on the stock he held in that company.

Macdonald had recommended him to take a one-fifth portion, being 60,000 shares, in the 300,000 that was proposed to be issued to and paid for by the promoters of Bullion No. 2; and after a good deal of correspondence, on August 1st, the defendant writes Macdonald that he was ready to take one-fifth of the said amount.

It was afterwards arranged that for these shares he should give his two promissory notes—one for \$3,000, dated August 14th, 1899, at two months, and the other for \$3,000, dated October 16th, payable in four months, both payable to plaintiff's order.

The first of these notes was paid at maturity, and the other was twice renewed, and the last renewal of it is the acceptance sued upon herein; and it is the amount of the first note paid at maturity that the defendant is counterclaiming to recover.

From this time until Macdonald's death (9th February, 1900), a great deal of correspondence passed between Macdonald and Rogers in connection with the flotation of the new company's stock; and after his death the efforts to sell the stock were continued by Sproule and by Mr. Garvey, who had been

a partner of Macdonald; but it appears that as late as March 24th, 1900, there still remained unsold about 50,000 of the 300,000 shares, the proceeds of which at ten cents per share were to be paid to plaintiff as the cash payment for the two locations; also that the plaintiff had expended about \$13,000 in development work, which, under the agreement, was to be a charge on the treasury stock, none of which stock had been sold.

It also appears from the correspondence that the South African war and the collapse of "War Eagle" had, among other incidents, made it difficult to sell the stock. Excuses were also made from time to time that owing to delay in getting reports from plaintiff company, and other material for prospectus, sales had been delayed.

No further sales of the stock having been effected, plaintiff company shut down development work on May 1st, 1900, and this event was followed by a considerable amount of correspondence, and it is evident that before the end of May, 1900, the parties had little hope that the original scheme would be carried out, and it seems to have been practically abandoned; and during the balance of the year 1900 different efforts were made to sell the stock at a lower price than that proposed in the original scheme, but the market for gold-mining stock having become demoralized, nothing was accomplished.

There never was any allotment or issue of any of the stock of Bullion No. 2.

I find upon the whole evidence that the original purposes and objects of the formation of Bullion No. 2 have, through no fault of the defendant, become in a business sense utterly impracticable, and that all expectation of realizing the successful carrying out of the agreement as originally entered into between plaintiff and Macdonald, and which was the basis of defendant's agreement, has been abandoned. Plaintiff did not in fact, as required by the agreement, convey the said locations to Bullion No. 2. In January, 1901, a transfer appears to have been executed, but not registered, so that under sec. 41 of ch. 138, R.S.O., plaintiff is still the owner.

I also find that Macdonald was the agent of plaintiff company to sell the 60,000 to defendant, and was the agent

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only of the defendant to pay over the purchase money and receive the shares. The plaintiff has never been in a position to carry out the agreement made by its agent with the defendant, and in my opinion, therefore, is not in a position to enforce the agreement against the defendant.

See Fry on Specific Performance (4th ed.), p. 404, *et seq.*, and cases there cited.

In other words, I think the consideration for the draft sued on has entirely failed.

It was argued on behalf of the plaintiff that, even if this view prevailed as to the original note given, the effect of the two renewals was to estop the defendant from the defence of want of consideration in the original note. I do not find that there was any circumstance in connection with either of the renewals which furnished further consideration to support the renewal. I take it to be well settled that if an original note is voidable for failure of consideration, no amount of renewing will cure the defect, unless some new consideration is introduced, and that a mere compliance with defendant's request to renew does not constitute such consideration.

Edwards v. Chancellor (1888), 52 J.P. 454, is a case where a jury had found that there was no consideration for the note, and in delivering judgment, Pollock, B., says: "Where there is no consideration originally, and the bill is renewed, the bill so renewed is void. The fact of renewal does not import consideration," etc.

The same point was decided in *Hooker v. Hubbard* (1869), 102 Mass. 239. See also Daniel on Negotiable Instruments (5th ed.), sec. 203, p. 232.

The action will therefore be dismissed with costs.

As to the counterclaim; having already found that the company in which the plaintiff agreed to sell stock to the defendant was in effect an abortive enterprise, through no fault of the defendant, and that the stock never has been and cannot be delivered, I think under the authorities the defendant is entitled to recover from the plaintiff the purchase money paid by him on account of such stock, such money having been paid by the defendant for a consideration which has failed, and is therefore recoverable. See cases cited in Bullen & Leake

(5th ed.), p. 298 ; also *Ashpitel v. Sercombe* (1850), 5 Ex-147 ; *Johnson v. Goslett* (1858), 27 L.J. N.S.C.P. 122 ; *Confederation Life Association v. Township of Howard* (1894), 25 O.R. 197 ; *Lindley on Companies* (6th ed. pp. 33-39, and cases there cited.

The amount paid by defendant to the plaintiff was \$3,000, but I do not think it is a case for interest under the provisions of the statute, prior to the filing of the counterclaim on the 10th December, 1901.

There will, therefore, be judgment in favour of the defendant against the plaintiffs for \$3,000 and interest from the above-mentioned date, together with his costs of the counterclaim.

From this judgment the plaintiffs appealed to the Divisional Court.

On October 20th, 1905, the appeal was heard before MEREDITH, C.J.C.P., ANGLIN and CLUTE, JJ., the same counsel appearing, when the appeal was dismissed with costs.

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CHATHAM GAS COMPANY AND THE CORPORATION OF THE
CITY OF CHATHAM.

Negligence—Effective Cause—Accident—Liability—Allowing guy wire to hang loose—Contact with live wire.

The defendant company's workmen while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by these workmen, or some third party, as to which there was no evidence, it was thrown across a power wire so as to become a live wire, whereby the plaintiffs coming in contact therewith were injured :—

Held, that the original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs and that the defendant company were liable therefor.

THIS was an action tried before ANGLIN, J., without a jury, at Chatham, on March 7th, 1905.

G. A. Sayer, for the plaintiffs.

M. Houston and *F. Stone*, for the defendants, the Chatham Gas Company.

W. E. Gundy and *J. M. Pike*, for the defendants, the corporation of the city of Chatham.

At the conclusion of the evidence the learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are stated :—

March 31. ANGLIN, J. :—This action is brought for damages sustained by the plaintiffs caused by contact with a guy wire of the defendants, the corporation of the city of Chatham, which had become "live" by being thrown across or laid over one or two power wires of the defendants, the Chatham Gas Company.

The plaintiffs offered no direct evidence to show how it became loose, no evidence to show how it came to be across the wires of the defendants, the gas company.

The evidence adduced by the plaintiffs was that on the evening preceding the accident this guy wire was lying loose upon the ground. One employee of the defendants, the gas

company, who was working stringing wires on their poles on Van Allen street, saw this wire loose, and he says that there were three or four feet of it upon the ground. He did not notice that it was over the wires of the gas company, but would not swear it was not then hanging over and from these wires, which are some thirty feet above the ground.

The suggestion made by the plaintiffs was that the workmen of the gas company cut this guy wire loose for the purpose of straightening a pole of the gas company to which it was attached, and which had certainly been straightened by these workmen. While this is not improbable, I could not find, upon the evidence adduced by the plaintiffs, that it was established as a fact that this guy wire was cut loose by the workmen of the defendants, the gas company. But the evidence called by the defendants, the corporation of the city of Chatham, upon their defence, made it perfectly clear that the guy wire was in fact cut loose by the workmen of their co-defendants.

The plaintiffs are, I think, entitled to ask that this evidence should be taken as part of their case. It was made clear that the witness who gave it was subpoenaed for the plaintiffs, and that but for his refusal to make any statement to the plaintiffs' solicitor, he would have been called as a witness for the plaintiffs. If necessary I would permit the plaintiffs' case to be re-opened and this evidence made part of it. I, therefore, find the fact established that the guy wire in question was cut and left loose by the workmen of the defendants, the Chatham Gas Company, engaged in straightening the company's pole to which it was attached.

But it has not been shewn that the company's workmen placed or drew this wire across or put it in contact with the power wires which they had been stringing. These men left their work about 5.30 p.m. on the evening of August 9th. On the morning of August 10th the guy wire was seen across the power wires and hanging from them down to the ground. The linesman of the gas company says that the guy wire could not have been thrown as it was over the power wires from the ground; that to throw it as it was found, across the power wires, it would be necessary to climb the pole. Not only is there no evidence of any other person having in any way

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interfered with the guy wire, but it seems highly improbable that it would have been in the position in which it was on the morning of August 10th, 1904, unless it had been—no doubt accidentally or unintentionally—drawn over the power wires of the defendant company by their workmen when the latter were stringing the latter wires.

The circumstances would, I think, justify an inference that the workmen of the defendant company did heedlessly—perhaps unintentionally—put the guy wire in the position which, when the electric current was turned into the company's wires, made it dangerous. But if the actual throwing of the loose guy wire over the other wires were the act of some passer by, who thought thus to put it out of the way, or even of some mischievous urchin, it seems to me such a likely and probable thing to happen that it is not too remotely connected with the act of cutting the guy wire from its fastenings and leaving it loose on the ground to render those guilty of the latter negligence liable for the consequences which ensued though an independent agency had intervened as their immediate cause. The original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs: *McDowall v. Great Western R.W. Co.* [1902], 1 K.B. 618, [1903] 2 K.B. 331, 337-8.

I therefore find that the defendants, the Chatham Gas Company, are responsible for the dangerous position of the live wire in question on August 10th, 1904, and for the injuries which it occasioned to the plaintiffs. The other defendants are in nowise responsible, and the action against them fails.

G. F. H.

[IN CHAMBERS.]

IN RE SMITH.

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Sept. 22.

Will—Construction—Gift of 'all my real estate being composed of,' etc.—After-acquired Property.

A testator devised "all my real estate . . . being composed of the south-east part of lot 10 . ." . Afterwards he acquired the northerly half of said lot 10:—

Held that the after-acquired property passed under the devise.

THIS was an application by one of the executors of the will of William Henry Smith, late of the township of South Crosby, in the county of Leeds, for an order or declaration of the Court determining whether certain lands in the township passed under the devises to Margaret Kerr and William John Kerr contained in the will, or whether the testator died intestate as to the said lands.

The will in question, after disposing of the personal estate, proceeded as follows:—

"To my beloved sister, the said Margaret Kerr, I give, devise and bequeath the use and benefit of all my real estate during the term of her natural life, said real estate being composed of the south-east part of lot 10 in the 4th concession of the township of South Crosby in the county of Leeds and Province of Ontario, and containing 100 acres of land, be the same more or less.

At the death of my sister, the said Margaret Kerr, I give and devise the aforesaid real estate to her son, my nephew William John Kerr, to his own use and benefit forever."

After the date of the will, the testator became the owner of the northerly half of the said lot 10, and the question was whether this passed under the will as well as the south-east half.

The motion was argued on September 21, 1905, in Chambers, before BOYD, C.

J. E. Jones, for the adult next of kin of the testator, referred to *Crombie v. Cooper* (1875-1877), 22 Gr. 267, 271, 24 Gr. 470;

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Vansickle v. Vansickle (1882-4), 1 O.R. 107, 9 A.R. 352; *Morrison v. Morrison* (1885), 9 O.R. 223, 10 O.R. 303; *In re Champion, Dudley v. Champion*, [1893] 1 Ch. D. 101.

W. E. Raney, for Margaret Kerr and W. J. Kerr, referred to *In re Champion* (1853), 1 Busb. Eq. (N.C.) 246; *Durboraw v. Durboraw* (1903), 67 Kans. 139; *Armour on Devolution*, p. 85; *Jarman on Wills*, 5th ed., vol. 1, p. 290; *Hawkins on Wills*, 2nd Am. ed., pp. 19-20; *Theobald on Wills*, 6th ed., p. 139.

September 22. BOYD, C.:—This case falls within the rule of construction expressed by the Lord Chancellor in *West v. Lawday* (1865), 11 H.L.C. 375, 384, that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift. This rule of common-sense is now alike applicable to the testamentary dispositions whether of land or of personal property by virtue of the Wills Act, and of the Devolution of Estates Act. The will speaks from the time of death so as to carry after-acquired lands if no contrary intention appears therein and the characteristics of realty and personalty are now by Statute so assimilated that the whole is to be distributed as personal property. It was always the rule that a general gift of personal property carried the whole personalty though there might be an imperfect enumeration of the particulars of the estate: *Dean v. Gibson* (1867), L.R. 3 Eq. 713. And it would seem that no reason now exists to make such a distinction *quoad* realty as was adverted to in *Crombie v. Cooper*, 22 Gr. 267, 24 Gr. 470. The effect of that decision is, I think, a great deal reduced by *Vansickle v. Vansickle*, 9 A.R. 352, but neither case covers the precise point which arises on this will. The words used in the *Crombie* case as to the disposition of the "remainder" were not so comprehensive as the expression in this will, which is "all my real estate" being composed of, etc. The particular land mentioned was an accurate description of the estate at the date of the will but was not so at the date of death. But I cannot read any expressed indication on the face of the will to exclude subsequently acquired land. The history of the testator's property as to when he obtained it, is not to be

considered : *Higgins v. Dawson*, [1902] A.C., 1, 7. The testator reading the will before death and knowing that it carried after gotten land might well leave it as it is, covering his then real estate. If the will had been executed on the day of death it would clearly have carried all his land though by mistake he had specifically described only part of it : because the presumption against intestacy and the general words of description would have prevailed against presumption against disinheriting the heir.

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Two cases cited from American lawyers are in accord with my conclusion : *In re Champion*, 1 Busb. Eq. (N.C.) 246 : *Duboraw v. Duboraw*, 67 Kans. 139.

All the land goes by will to the beneficiaries named. Costs out of the estate.

A. H. F. L.

[DIVISIONAL COURT.]

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June 13.
June 27.

MOLSONS BANK V. EAGER.

Vendor and Purchaser—Incumbrance—Lis Pendens—Adverse Claims to Purchase Money—Interpleader—Rule 1103 (a).

A certificate of *lis pendens* is not an incumbrance within the meaning of R.S.O. 1897, ch. 119, sec. 16.

One who had contracted to purchase land was sued by his vendor for the purchase money, and an action was brought in respect of the same land by creditors of the vendor's husband, seeking to set aside a conveyance of the land by the husband to the wife :—

Held, that, although the purchase money was not actually claimed in the latter action, yet, as the plaintiffs therein appeared upon an interpleader application by the purchaser and stated their willingness that the purchase should be carried out, the purchase money being applied to pay the debts of the husband, they were making an "adverse claim" to the purchase money, within the meaning of Rule 1103 (a), and the purchaser was entitled to an interpleader order.

Decision of ANGLIN, J., reversed.

MOTION by Alexander Rose, purchaser, for leave to pay his purchase money into Court to create a fund to discharge an incumbrance, or for an interpleader order. The facts are stated in the judgments.

The motion was heard by ANGLIN, J., in Chambers, on the 9th June, 1905.

D. L. McCarthy, for the applicant.

H. M. Mowat, K.C., for the defendants in the action, Isabella Sanderson, the vendor, Thomas Sanderson, and Daniel Eager.

J. A. Macintosh, for the Molsons Bank, the plaintiffs in the action.

June 13. ANGLIN, J.:—Given the complexion most favourable to the contention of the applicant, the material facts upon this motion may be stated as follows :—

In a pending action the Molsons Bank seeks to set aside, as fraudulent as against itself and his other creditors, a grant of certain lands by one Sanderson to his wife, the present vendor. Before accepting conveyance of these lands or paying the purchase money, the purchaser from Mrs. Sanderson is apprised of the registration of a certificate of *lis pendens* issued in the action brought by the bank.

Upon the purchaser's refusal to complete his purchase the vendor sues for the purchase money, alleging that a conveyance of the lands in question had been duly accepted and registered on behalf of the purchaser before the registration of the certificate of *lis pendens*, and in such circumstances that the purchaser cannot be said to have had actual knowledge of the bank's position. The bank intimates its intention to press its attack upon the vendor's title, insisting that the purchaser is bound by notice of its claim and can only acquire the lands subject to it.

The purchaser now moves, under R.S.O. 1897, ch. 119, sec. 15, *for an order permitting him to pay his purchase money into Court "to create a fund to discharge an incumbrance in the nature of a *lis pendens*," etc. In the alternative he asks for relief by way of interpleader under Rule 1103† alleging that he is under liability for a debt, or for money for or in respect of which he is or expects to be sued by two persons making adverse claims thereto.

That the registration of a certificate of *lis pendens* is not an incumbrance within the meaning of R.S.O. 1897, ch. 119, sec. 15, is abundantly clear. It does not create any lien or charge upon the lands against which it is registered. Nor is this case one in which it would be at all possible to comply with the requirements of the statutory provision which the purchaser invokes.

Neither is he entitled to relief by way of interpleader. His vendor claims the purchase money of the lands in question. That may be a debt or money for which the purchaser is under liability to his vendor. But the Molsons Bank does not and cannot assert any liability on the part of the purchaser to pay

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*15. Where land subject to any incumbrance . . . is sold by the Court or out of Court, the High Court . . . may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court . . . of the amount sufficient to meet the incumbrance and any interest due thereon

(2) Thereupon the Court may, if it thinks fit, . . . declare the land to be freed from the incumbrance.

†1103. Relief by way of interpleader may be granted. (a) Where the person seeking relief . . . is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more persons . . . making adverse claim thereto.

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to it such purchase money. Its claim must be to have it declared that the lands in question are exigible to meet the demands of itself and the other creditors of the vendor's grantor. Rule 1103 "deals with a liability in one person to pay a specific sum of money, while at the same time two other persons are making claims in respect of that sum:" *Ingham v. Walker* (1887), 3 Times L.R. 448, 31 Sol. Jour. 271. See too *Baxter v. Day* (1888), 73 Wisc. 27.

This application is, I think, wrongly conceived, and must be dismissed with costs to be paid by the applicant to the vendor. The Molsons Bank, having supported the motion, should have no costs.

Alexander Rose appealed from the decision of ANGLIN, J., and his appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., STREET and BRITTON, JJ., on the 27th June, 1905.

The same counsel appeared.

June 27. The judgment of the Court was delivered by MEREDITH, C.J.:—We think we can do what the justice of this case demands without stretching the language of the Rule which governs, which is Rule 1103.

The position of matters, as far as the bank is concerned, is, that the bank is attacking the transaction by which the property which was sold to Rose passed from the husband to the wife (Mrs. Sanderson) who is the vendor. The bank says that the transaction was fraudulent as against creditors, and has brought an action to set it aside and make the property available to satisfy the debts of Sanderson. The bank says it is now and has always been content that the purchase by Rose should be carried out, and seeks to get only the purchase money, the \$4,000, I believe it is, applied to pay the debts of Sanderson.

I have no doubt that the bank could have brought an action alleging the fraudulent character of the transaction, the conveyance to Rose, and alleging also that the conveyance had been registered, but that the purchase money had not been paid, and claiming to restrain the payment of that money to Mrs. Sanderson until the determination of the action, and on proof

of these allegations that would be the relief to which the bank would be entitled.

The fund in dispute is the \$4,000 purchase money which Mrs. Sanderson is claiming as payable to her for the price of the land. The bank also claims it for itself and the other creditors of the husband.

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Surely, if the English language means anything, that comes within the very words of sub-sec. (a) of Rule 1103 :

“Where the person seeking relief (hereafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is, or expects to be, sued by two or more persons (hereinafter called the claimants) making adverse claim thereto.”

Here the appellant is undoubtedly under a liability for a debt, and in respect of that debt he expects to be sued—he is sued by Mrs. Sanderson, and expects to be sued by the Molsons Bank, and there can be no doubt that they are making adverse claims to the purchase money.

The order must be reversed and an interpleader issue directed unless the parties can agree upon what would seem a more easy way of settling the dispute—to let Rose be made a defendant in the action of the Molsons Bank and pay his purchase money into Court, and then let the bank and Mrs. Sanderson fight out the question of who is entitled to it, the creditors or Mrs. Sanderson; but, if the parties cannot agree, there will be the usual interpleader order, to try whether the money is payable to Mrs. Sanderson or is available for the payment of the creditors of her husband.

The applicant, the appellant, Rose, will be entitled to his costs of the application to my brother Anglin and of this appeal, to be deducted from the fund, and the other costs will abide the result of the interpleader issue.

[An order was made by OSLER, J.A., on the 8th November, 1905, granting Isabella Sanderson leave to appeal to the Court of Appeal from the order of the Divisional Court, and extending the time for appealing.]

E. B. B.

[BRITTON, J.]

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Oct. 16.

ROYAL TRUST COMPANY V. MILLIGAN.

Arbitration and Award—Partnership—Nomination of Arbitrator to Adjust Accounts—Staying Action.

A partnership agreement contained a provision by which the parties thereto nominated and appointed a named person "as sole and final arbitrator in case of the death of either of the partners before the expiration of the said contract to finally adjust and settle all matters between the survivor and the personal representatives of the deceased partner within such time and on such conditions as he may see fit:"—

Held, upon the application of the surviving partners in an action brought against them by the personal representatives of the deceased partner to have the accounts of the partnership wound up, that this clause applied, and the action was stayed and a reference to the arbitrator directed.

APPLICATION by the defendants to stay proceedings in the action, and for a reference to arbitration, heard at the Ottawa Weekly Court on the 7th of October, 1905, before BRITTON, J., in whose judgment the facts are stated.

F. R. Latchford, K.C., for the defendants.

J. F. Orde, for the plaintiffs.

October 16. BRITTON, J.:—The agreement under consideration was made on the 1st of March, 1904. The late Mr. St. Jacques sold to the defendants an undivided half interest in the license, lease, furniture (except furniture, etc., in one room), supplies and tenant's fixtures, in the Russell House, Ottawa, for \$50,000. St. Jacques and the defendants then entered into partnership as hotel keepers, the partnership to commence on the 10th of March, 1904, and to continue until the 1st of May, 1912, unless the same should be sooner terminated as thereafter mentioned. There is not in the agreement any express provision for the sooner termination of that partnership. The partnership has, however, been terminated by the death of St. Jacques, which occurred on the 20th of December, 1904, and that event was provided for by paragraph 13 of the agreement, which is as follows:

"The parties hereto nominate and appoint Michael James Gorman of the said city of Ottawa, barrister-at-law, as sole and

final arbitrator in case of the death of either of the partners before the expiration of the said term to finally adjust and settle all matters between the survivor and the personal representatives of the deceased partner within such time and on such conditions as he may see fit."

Since the death of St. Jacques, the plaintiffs as administrators of his estate have endeavoured without success to get a settlement with the defendants, and to have the partnership business wound up, and on the 17th of August, 1905, this action was commenced. The defendants have appeared and now make the motion pursuant to the Arbitration Act, R.S.O. 1897, ch. 62, sec. 6.

I have read most of the many cases cited upon the argument, and I confess in view of the law and facts in this case to having had some difficulty in reaching a conclusion satisfactory to myself; but I am "satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement." The defendants were at the time the action was commenced, and still remain, ready and willing to do all things necessary to the proper conduct of the arbitration, and so proceedings in the action should be stayed as the order will provide.

The matters to be referred are not in terms limited to matters in difference. The agreement does not contemplate merely disputes which may have arisen in carrying on the business, or which may arise in the winding up, but all matters between the survivor and the personal representatives of the deceased partner arising out of the agreement and business carried on.

Cook v. Catchpole (1864), 34 L.J. Ch. 60, was cited by the plaintiffs. Misconduct and fraud were charged in that case; none here. That case decides that "the onus of proof that an arbitrator could not give efficient relief lies on the person proceeding otherwise than by arbitration."

This is not a case of whether the partnership should be dissolved or not, as was *Turnell v. Sanderson* (1891), 60 L.J. Ch. 703.

Gillett v. Thornton (1875), 44 L.J. Ch. 398, is in favour of the present application.

Apart from the wide wording of the agreement, there was, in my opinion, before action, and now, a difference or dispute

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existing which would give the arbitrator jurisdiction even if the agreement had said, "all matters in difference or dispute."

In *Turnock v. Sartoris* (1889), 43 Ch. D. 150, the agreement to refer was merely limited to the lease and its construction. The agreement is much wider here and "if parties choose to determine for themselves that they will have a domestic forum . . . then a *prima facie* duty is cast upon the Courts to act upon such agreement." See also *Lyon v. Johnson* (1889), 40 Ch. D. 579. The citation is appropriate, although in that case the learned Judge thought there was sufficient upon the facts to warrant the exercise of his discretion to refuse the order.

In *Piercy v. Young* (1879), 14 Ch. D. 200, it was held that the question whether the matters in dispute are within the agreement for arbitration is one which the Court will decide and not leave to the arbitrator. I think the matters in dispute are within the agreement.

The cases of *Spurrier v. La Cloche*, [1902] A.C. 446; and *Nolan v. Ocean Accident and Guarantee Corporation* (1903), 5 O.L.R. 544, did not assist me, for these determined that there was no cause of action until the determination by an arbitrator. Here upon the death of one partner there was liability on the part of the survivors to account.

Scott v. Avery (1856), 5 H.L.C. 811, goes further and holds that even if the difference relate to other matters than mere amount no action is maintainable until award.

The action is for the appointment of a receiver and for an injunction. The order will be to stay proceedings in the action, subject to this that the plaintiffs may at any time upon such material as they may deem sufficient apply for the appointment of a receiver, or for an injunction. This right is not limited to an application when the award is made, but liberty to the plaintiffs to apply is reserved—a general liberty to apply at any time for the protection of the partnership property, and to prevent the improper use or disposition of it pending the settlement of the matters in question: see *Compagnie du Senegal v. Woods* (1883), 53 L.J. Ch. 166.

The parties will, no doubt, if they go before the arbitrator, proceed speedily with a view to a complete settlement, and as

upon the argument all parties expressed confidence in the arbitrator proceedings will be facilitated, and upon his award (or before it if the parties agree) all legal questions can be determined.

Costs of all parties reserved to be disposed of later upon application to a Judge.

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[DIVISIONAL COURT.]

REX V. BRECKENRIDGE.

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Oct. 19.

Alien Labour Act—Consent to Prosecution—60 & 61 Vict. ch. 11 (D.)—1 Edw. VII. ch. 13 (D.)

The written consent required by sub-sec. 3 of sec. 3 of the Alien Labour Act, 60 & 61 Vict. ch. 11 (D.) as amended by 1 Edw. VII. ch. 13 (D.) for the bringing of the proceedings for the recovery of a penalty for an offence against the Act must contain a general statement of the offence alleged to have been committed, the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged.

A consent "to a summary prosecution being maintained under the provisions of the Alien Labour Act against A. for violations of the above Act and amendments thereto," is not sufficient.

Conviction quashed.

CASE stated by the police magistrate at Ottawa under the provisions of sec. 900 of the Criminal Code, 1892.

The defendant was convicted on the 9th of May, 1905, for that he "on or about the 28th day of March, A.D. 1905, at the city of Ottawa aforesaid, did unlawfully and knowingly assist the importation of E. L. Day, an alien and foreigner, into Canada under contract and agreement made previous to his importation to perform labour and service in Canada, namely, at the office of the International Harvester Company of America, in the service and employ of the said International Harvester Company of America, contrary to the form of the statute in such case made and provided."

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The appeal was argued before a Divisional Court [MEREDITH, C.J., C.P., ANGLIN, and CLUTE, JJ.] on the 19th of September, 1905.

W. H. Blake, K.C., for the defendant.

J. G. O'Donoghue, for the private prosecutor.

A preliminary objection by counsel for the private prosecutor that there was no right of appeal by way of stated case, the police magistrate being *persona designata*, was overruled, and the argument proceeded on the merits. A number of objections to the validity of the conviction were advanced but it is unnecessary to give the arguments as the decision turned upon the question of the sufficiency of the preliminary consent to the bringing of the prosecution, and this point is fully dealt with in the judgment.

October 19. The judgment of the Court was delivered by MEREDITH, C.J.:—The statute under the authority of which the conviction is made is the Dominion Act, 60 & 61 Vict. ch. 11, intituled, "An Act to restrict the importation and employment of Aliens," as amended by the Acts 61 Vict. ch. 2, and 1 Edw. VII. ch. 13.

In the view I take it is unnecessary to consider any of the objections to the conviction except (b) "The consent filed herein is insufficient in law to authorize the proceedings herein."

By sec. 3 of the principal Act as amended the written consent "of the Attorney-General of the Province in which the prosecution is had or of a judge of a superior court or county court" is a condition precedent to the recovery by summary conviction of the penalty imposed by the Act, and therefore to the jurisdiction of the functionaries before whom it may be recovered attaching.

The consent referred to in the case is in the following form :
"In the matter of a proposed information against F. E. Breckenridge for violation of the Alien Labour Act (60-61 Vict. ch. 11; 61 Vict. ch. 2; 1 Edw. VII. ch. 13). I, John J. O'Meara, junior Judge of the county of Carleton, do hereby consent to a summary prosecution being maintained, under the provisions of

the Alien Labour Act (60-61 Vict. ch. 11; 61 Vict. ch. 2; 1 Edw. VII. ch. 13) against Frank E. Breckenridge, general agent of the International Harvester Company of America, or against the said International Harvester Company of America, or both for violations of the above Act and amendments thereto.

Dated at Ottawa this 15th day of April, 1905.

(Signed) J. J. O'Meara,

Junior Judge of the county of Carleton."

It will be observed that there is no reference to the person or persons in respect of whom the violations of the Act are alleged to have been committed or of the time when or place where the violations occurred.

I am of opinion that this document is not such a consent as the Act requires, and that therefore the police magistrate had no jurisdiction to entertain or try the charge upon which the defendant has been convicted.

The purpose of requiring the consent was doubtless to prevent frivolous complaints being laid and in order to determine whether the consent should be given it was necessary that the learned junior Judge should be informed of the facts so that he might judge whether there was reasonable ground for the prosecution which it was desired should be authorized to be begun.

For all that appears in the consent or from its terms, the alleged violations of the Act which were laid before the learned Judge were in respect of persons other than Day and the case of Day may not have been even mentioned to him.

The written consent should, in my opinion, at the least contain a general statement of the offence alleged to have been committed, not necessarily in the technical form which would be required in an information or conviction, but mentioning the name of the person in respect of whom the offence is alleged to have been committed and the time and place with sufficient certainty to identify the particular offence intended to be charged.

If it were otherwise, the protection which the written consent was intended to give would be wholly illusory, and it would be possible to prosecute for an offence entirely different

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from that brought to the notice of the Judge, and to which such a consent as the one before us was intended to apply.

I would therefore answer the question submitted in the affirmative, and the conviction must therefore be quashed.

As to costs: The point upon which we have decided in favour of the defendant is a new one, arising now, as far as I am aware, for the first time, and I would therefore give no costs to either party.

R. S. C.

[DIVISIONAL COURT.]

RE DEWAR AND TOWNSHIP OF EAST WILLIAMS.

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May 18.
June 27.

Municipal Corporations—By-Law—Local Option in Intoxicating Liquors—Right of Council to Pass upon By-Law Approved by Electors—Procedure at Meetings—Defeat of Motion—Subsequent Re-introduction and Adoption—Statute, Imperative or Directory.

A local option by-law of a township was voted upon and approved by the electors on the 2nd January, 1905, and was finally passed by the unanimous vote of the council at a special meeting held on the 21st January, 1905. It was objected that the council had no power to pass the by-law on that day, because at a meeting of the council on the 9th January, when only four of the five members were present, a motion for the final passing was negatived as the result of two voting for the motion and two against:—

Held, that it was competent for the council at the special meeting of the 21st January to reconsider their action, to reverse it, and, without again introducing and submitting the by-law to the vote of the electors, to pass it.

Re Wilson and Town of Ingersoll (1894), 25 O.R. 439, commented upon.

Per ANGLIN, J.:—The first sentence of sec. 373 of the Municipal Act, 3 Edw. VII. ch. 19 (O.), is not imperative; notwithstanding the approval of the electors, the council may still reject the by-law, and are not bound to pass it.

Decision of BRITTON, J., affirmed.

MOTION by John Dewar, a ratepayer, to quash a local option by-law of the township of East Williams. The facts are stated in the judgments.

The motion was heard by BRITTON, J., in the Weekly Court, on the 17th May, 1905.

J. Haverson, K.C., for the applicant.

C. A. Masten, for the township corporation.

May 18. BRITTON, J.:—The council introduced and passed this by-law through its preliminary stage, pursuant to sec. 141 of ch. 245, R.S.O. 1897.

Such a by-law must be approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. These sections are 338 and following of 3 Edw. VII. ch. 19 (O.)

No objection was taken to any proceedings for obtaining the assent of the electors. The by-law was voted upon and carried on the 2nd January, 1905. All that remained was to finally pass it by the council, and this could not be done until

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after one month from the first publication in the newspaper of the notice of the hour, day, and place or places for taking the votes of the electors: see sec. 338, sub-sec. 3; and it must be done within six weeks after the by-law was carried by the votes of the qualified electors: see sec. 373.

The by-law attacked was finally passed by the council on the 21st January, 1905, and is now before the Court as a complete by-law, passed and assented to, so far as appears, in strict conformity with the Act, and valid on its face. It is objected that on the 9th January, when only four members of the council were present, it was proposed to finally pass this by-law, but then two of the members of the council voted against it and two for it, so, under sec. 274, the resolution was negatived, and that, it being a defeated by-law on the 9th, it could not be taken up again at all on the 21st.

I am of opinion that the matter could be reconsidered as was done on the 21st January. It appears on affidavit filed that one of the council, who on the 9th voted nay, at once asked for reconsideration, and a meeting of the council was called for that purpose.

Section 373 applies, and it was the duty of the council to pass the by-law, the electors having carried it, and no objection having been made by motion to quash or otherwise.

The law has been changed since the decision of *Canada Atlantic R. W. Co. v. City of Ottawa* (1886), 12 S.C.R. 365. Then the notice was, and on that the decision rested, that the by-law would be taken into consideration, etc.: see R.S.O. 1877, ch. 174, sec. 286, sub-sec. 3. Now sec. 373 seems imperative.

Then the motion, negatived on the 9th January by the members being "*a tie*," might well be considered as only a motion to deal with it at that time when only four were present, and that the two apparently voting against the by-law intended to vote only against the matter being taken up in the absence of the fifth member of the council.

On the 21st the by-law was finally passed by the unanimous vote of the council.

There were no rules of the council as to reconsideration or as to what may or may not be done at a session—no rules of procedure.

I think *Re Wilson and Town of Ingersoll* (1894), 25 O.R. 439, is not an authority in the matter of a local option by-law, and it is not, upon the facts before me, an authority in favour of the applicant's contention.

I think the motion must be dismissed, and I am not sorry to come to that conclusion in a case where the entire council seem in favour of the by-law, and where a substantial majority of all the electors voted for it.

Motion dismissed with costs.

The applicant, Dewar, appealed from the decision of BRITTON, J., and his appeal was heard by a Divisional Court composed of BOYD, C.; ANGLIN and MAGEE, JJ., on the 13th June, 1905.

The same counsel appeared.

The arguments and authorities cited are sufficiently referred to in the judgments.

June 27. BOYD, C.:—This local option by-law was initiated by the township, and was duly submitted for the approval of the electors after the notice prescribed, that, in the event of the assent of the electors, it would be finally passed by the council: R.S.O. 1897, ch. 245, sec. 141 (1), and ch. 223, sec. 338 (3). The electorate did approve of the proposed by-law, and it was finally passed by the council on the 21st January, 1905, within the statutory period of one month from its first publication.

The by-law is of proper form, and its validity is attacked on the sole ground that at a meeting of the council of the 9th January, upon a resolution being moved that the by-law pass, the council equally divided; so that, by the application of the statutory rule, the passage of the by-law was defeated. Section 274 says, "any question on which there is an equality of votes shall be deemed to be negatived." The meaning of that is, it is negatived or ended for the time being, but it is always of competence for the council to reconsider the question at a later meeting. As tersely put by the Chief Justice in *Jersey City v. State* (1863), 30 N.J.L. 521, 529, "the right of reconsidering lost measures inheres in every body possessing legislative powers." See *Sank v. City of Philadelphia* (1871), 8 Phila. 117,

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and other cases in 21 Eng. & Am. Encyc. of Law, 2nd ed., p. 968, "Ordinances."

It is not necessary, as was argued for the council in this case, to begin *de novo* by submitting the by-law to the electors; the electors had expressed already their approval of that particular by-law, and it only remained to pass it finally, which, as I read the statute in its present form, it was the duty of the council to do, if it was not petitioned against: ch. 223, secs. 338 and 373. The Liquor Act expressly incorporates the provisions of sec. 338 of the Municipal Act, and that naturally attracts the latter sections found classed under Div. III. of the Municipal Act providing for "*Voting on by Electors.*"

The traditional three readings of a by-law are superseded by the special directions given as to local option and other by-laws voted on by electors. The three stages of such by-laws are: first, initiation and consideration of the proposed by-law by the council, sec. 338 (3); second, vitality given to it by the approving vote of the electorate; and third, the final passage of it by the council. The council failed to take the final step at the first meeting, when there was an equality of votes, but succeeded in carrying out the intent of the Act on the second meeting, when the failure of the first was reconsidered and remedied.

The order is affirmed with costs.

ANGLIN, J.:—I am unable to read the first sentence of sec. 373 of 3 Edw. VII. ch. 19, as imperative. It is of general application, and if, as a result of the change made in what is now sub-sec. 3 of sec. 338, by the 5th section of ch. 37 of 49 Vict., the discretion which the municipal council formerly had, after a vote upon it by the ratepayers, of confirming or rejecting a by-law, (*Canada Atlantic R.W. Co. v. City of Ottawa*, 12 S.C.R. 365), is taken away and its function under that provision has become purely ministerial, the addition made to sec. 373, by 3 Edw. VII. ch. 18, sec. 81, is entirely supererogatory. That such an addition was made is in itself cogent proof that the legislature deemed the first sentence of the present sec. 373 non-imperative, notwithstanding the alteration in sec. 338, sub-sec. 3. The contrast between the words "it shall be the duty of," found in the second sentence of sec. 373, introduced by the

words of antithesis "provided however," and the simple word "shall" in the earlier sentence, in my view renders it impossible to regard the earlier clause as intended to require the council to pass, without the exercise of any discretion, every by-law "which is duly carried by the vote of the qualified electors." The by-law under consideration, not being one which "the council has been legally required by petition or otherwise to submit to a vote of the electors," does not come within the second clause of sec. 373, and is therefore not a by-law which "it shall be the duty of the council" to pass, but one which it may pass, if it so desires, within six weeks after its adoption by the electors, but not thereafter.

But in order to succeed the applicant must also sustain his other ground of appeal. Because at a meeting of the council, at which only four of its five members were present, held on the 9th January, 1905, the motion to pass this by-law was negatived by an equality of votes (sec. 274, 3 Edw. VII. ch. 19), the applicant contends that it was not competent for the council, as it did at a later meeting, attended by all five councillors, and held on the 21st January, within six weeks after the popular vote had been taken, to reconsider its former action and to pass the by-law.

Mr. Haverson relies upon *Re Wilson and Town of Ingersoll*, 25 O.R. 439. The authority of that case has been considerably shaken by comments upon it in *Dwyre v. Ottawa* (1898), 25 A.R. 121, 128, and *In re Kelly and Town of Toronto Junction* (1904), 8 O.L.R. 162, 167. It is not binding upon us as a Divisional Court, and, in so far as it may be inconsistent with the right of the municipal council to reconsider its refusal to pass the by-law on the 9th January, should, in my opinion, be overruled.

Much might be said to support the view that the vote of the 9th January meant nothing more than a refusal to pass the by-law presently. It is obvious that had the motion been not "that the by-law pass," but "that the by-law be rejected," the same equal vote would have negatived its rejection. The attitude of councillor William Phillips, who voted against the passing of the by-law, but immediately after the vote had been taken gave notice of his intention to demand reconsideration at

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a future meeting of the council, indicates that such was his understanding of the vote which he gave.

But even if the vote of the 9th January justified the declaration, which the reeve is said to have made, but which is not contained in the minutes of the council, that the by-law was lost, I agree that it was competent for the council at the special meeting of the 21st January to reconsider its action, to reverse it, and, without again introducing it and submitting it to the vote of the electors, to pass the by-law. The fullest right of reconsideration is generally recognized as one of the inherent rights of every deliberative body, unless such right is denied it or is limited by the power creating such body, or is relinquished, or is restricted by its own internal regulations. The Municipal Act contains no provision affecting the right of municipal councils to reconsider such a motion as that of the 9th January with which we are now dealing. Every municipal council is, by sec. 326 of the Municipal Act, empowered to make regulations for governing its proceedings. There is before us no evidence that any such regulations have been adopted by the municipal council of the township of East Williams. It follows that the motion for reconsideration carried at the meeting of the 21st January, and the motion to pass the by-law which followed, were regular and effective.

The appeal fails upon this ground and must be dismissed with costs.

MAGEE, J., concurred.

T. T. R.

[IN CHAMBERS.]

RE GILHULA.

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RE CAIN.

June 16.

Constitutional Law—Deportation of Aliens—60 & 61 Vict. ch. 11, sec. 6 (D.)—Ultra Vires.

Section 6 of 60 & 61 Vict. ch. 11 (D.) (amended by 1 Edw. VII. ch. 13, sec. 3), providing for the return of certain immigrants to the country whence they came, is beyond the powers of the Dominion Parliament, as necessarily involving the exercise of extra-territorial constraint; and detention of an immigrant for the illegal purpose of return is unwarranted.

JAMES R. GILHULA and Everett E. Cain, being in the custody of the Commissioner of Dominion Police, under a warrant of the Attorney-General for Canada, under sec. 6 of the Alien Labour Act, 60 & 61 Vict. ch. 11 (D.), as amended by 1 Edw. VII. ch. 13, sec. 3 (D.), commanding the Commissioner to take them into custody and return them to the United States of America, obtained writs of *habeas corpus*, and upon the return thereof moved for their discharge from custody, upon various ground outlined in the argument.

The motions were heard by ANGLIN, J., in Chambers, on the 9th and 10th June, 1905.

J. A. Robinson, for the applicant Gilhula. The Act applies only to those engaged in labour or service of any kind; these men, being train master and chief train despatcher respectively, do not come within the Act: *Holy Trinity Church v. United States* (1892), 143 U.S. 457; *United States v. Laws* (1896), 163 U.S. 258; *Welch v. Ellis* (1895), 22 A.R. 255; *Herman v. Wilson* (1900), 32 O.R. 60; *Cook v. North Metropolitan Tramways Co.* (1887), 18 Q.B.D. 683. The Attorney-General decided that the applicants were liable to deportation without calling them before him to shew cause against such an order. This could not be done unless expressly authorized by Act of Parliament, and, as there is no such enactment in the Alien Labour Act, it must be considered that the rule still applies. The act was a judicial one: *Capel v. Child* (1832),

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2 Cr. & J. 558; *Bonaker v. Evans* (1850), 16 Q.B. 162, 171; *The Queen v. Cheshire Lines Committee* (1873), L.R. 8 Q.B. 344; *Nicholls v. Cummings* (1877), 1 S.C.R. 395, at p. 428. It has been so held in the United States: *The Japanese Immigrant Case* (1903), 189 U.S. 86; *Fong Yue Ting v. United States* (1893), 149 U.S. 698. Section 6 of the Act is unconstitutional, as it involves a trespass on a foreign soil. The statute provides for the "return" of the alien. The cases are cited in 19 C.L.T., pp. 1, 41, in article there.

J. B. Mackenzie, for the applicant Cain. The undoubted right of a sovereign power to expel the subjects of a foreign state (*droit du renvoi*) will not, international courtesy forbidding, be exercised, unless war between the countries affected is either in actual progress or is threatened: Phillimore's Int. Law, vol. 1, p. 330; Kent's Commentaries, vol. 1, p. 35. It is not difficult to conceive of a *casus belli* being furnished through ill-judged action in this regard on the part of a colony: *Regina v. Schram*, *Regina v. Anderson* (1864), 14 C.P. 318. Whatever Great Britain, in common with countries of equal rank, might do by way of controlling the range of international law, Canada, being no higher than a non-sovereign legislating body (Dicey on the Constitution), could not, in any event, authorize legislation of the far-reaching kind put forth. She may have the right to deny entrance to, and yet none to send back, foreigners once admitted. Such a distinction was argued for by counsel in *Musgrove v. Chun Teeong Toy*, [1891] A.C. 272, the Court, however, not finding it necessary to determine the point. "Not alone their positive maltreatment, but a mere denial of justice to aliens by the land of their adoption ought to be resented by the State of which they are members:" Phillimore, vol. 4, pp. 2, 10. Should this power be considered as enjoyed, where is the line to be drawn? Why could we not give the consular agent of a foreign state his *cong  *? Section 6 of 60 Vict. ch. 11 is *ultra vires* of Parliament, because to act in pursuance of its authority would involve the exertion of extra-territorial force: Story's Conflict of Laws, 8th ed., pp. 22 *et seq.* The exigency of the warrant could be met by nothing short of the placing of its subject on foreign soil, or action towards him of which that would be the

natural consequences. The object of the statute, in fine, is the compulsory repatriation of one who had voluntarily expatriated himself. His deportation becomes *eo instanti* his importation, just as the import of articles of merchandise follows on the heels of their export. Besides, the active form of the verb has been employed. There is a person acting and a person acted upon. It is not as if the expression "the immigrant shall be returned" were used, where some eventuality might be left to his choice. The section is *ultra vires* for assuming a control over the high seas. A whole Province of Canada (Prince Edward Island) and a material portion of another (British Columbia) are disjoined from the rest by the ocean: *The Queen v. Mount* (1875), L. R. 6 P.C. 283, 293; *Ray v. McMackin* (1875), 1 Vict. L.R. (Cases at Law) 274; *In re Gleich* (1879), 1 O. B. & F. (S.C.N.Z.) 39. The great lakes are, themselves, part of the high seas, and, keeping in mind the purpose here, within Admiralty jurisdiction: *The Queen v. Sharp* (1869), 5 P. R. 135. Transfer from one part of the Dominion to another, could no more be directed, with such impediment existing, than could removal from Province to Province by order of a Legislature, the ordinary land boundary simply being interposed: Forsyth's Const. Law, p. 265; Quebec Rebels' Case; view of Sir John Macdonald concerning the possibility of a lunatic being conveyed from Ontario to Quebec; Lefroy's Legislative Power in Canada, p. 326. Every grant of power under the B. N. A. Act is partial and comparative (Quebec Resolution No. 29, which controls its framework), saving the sovereignty of Great Britain with each and all: *Merchants Bank of Halifax v. Gillespie* (1885), 10 S.C.R. 312; *Smiles v. Belford* (1877), 1 A. R. 436, 441. Authority to legislate with regard to "Naturalization and Aliens" bestows no right to govern their conduct in time of war; nor would it permit the arena of the Province to be entered, as in the matter of an alien's title to sue or hold property. The Dominion, too, is only empowered to arrest a subject, where a criminal offence has been committed, either by way of securing his attendance on the preliminary hearing or carrying out a sentence of imprisonment: *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700, at p. 716. The Canadian

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statute has no more than conditional force. There has to be a law or ordinance of the United States similar in character. And while this would not mean that the enactments must be identical, they should, at least, possess reciprocity, and not differ in essence. The law of the Republic treats Canada as a component part of the British Empire. She is not dealt with as a distinct geographical division. One conspicuous effect of the divergence is that immigrants from the United Kingdom or outlying possessions of the Crown may be returned to Canada, instead of the territory from which they came. Existing treaties guarantee citizens of both countries free ingress to, and egress from, the dominions of each in North America; stipulate for their immunity from being harassed *eundo, morando, et redeundo*. These, even if the contracting parties might dissolve them, Canada is powerless to modify or extinguish: *Regina v. Wing Chong* (1885), 1 B.C.R. (pt. II.) 150. Enforcement of this law by the two nations would, in many cases, lead to a violation of the extradition arrangement between them. The Commissioner of Dominion Police had no authority to arrest or detain the applicant. By R.S.C. 1886, ch. 184, he is constituted a judicial, not a ministerial, officer, and, should he be held to enjoy the power contended for, he might be called upon to execute his own process. The warrant is void for omitting to set forth circumstances which amount to a violation of the Act. The order of the language in sec. 1 is, by the description, varied in such a way as to allege the offence to be the assisting to form the contract, not the assisting to bring over a person then under engagement. The act to be charged against him in the warrant must be that which subjects the assister to a penalty. The absence there of the word "knowingly," therefore, vitiates it: *Rex v. Hayes* (1903), 5 O.L.R. 198. The assister, furthermore, having the expense of returning the immigrant saddled upon him by the statute, ought to have been formally adjudged to have violated its provisions.

G. F. Shepley, K.C., for the Attorney-General of Canada. The fundamental error in the applicants' position is the confusion of legislative, executive, and judicial functions. The power of the Parliament of Canada is supreme, and as full as that of the

Imperial Parliament itself. The B.N.A. Act contains no reservation except the reserved power of veto, which has not been exercised as to this law. The exclusive legislative authority of the Parliament of Canada extends to "Naturalization and Aliens:" B.N.A. Act, sec. 9 (25): and, in addition, there is the express power to legislate for "the peace, order, and good government of Canada." The Courts can determine the limits of jurisdiction, but cannot inquire whether a discretion given by Parliament has been wisely exercised: *Lefroy on Legislative Power in Canada*, pp. 244-259; *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, 585. I concede the principle that the Canadian Parliament cannot legislate for the doing of any act out of Canada. A proper construction of the statute in question will limit the acts thereby authorized to Canadian territory. It is not necessary to the enforcing of the law that any extra-territorial jurisdiction should be assumed, and, though some case may possibly be conceived which would require it, the statute should not on that account be held invalid; such a construction should be given to it as will uphold the jurisdiction. To carry out the law, it is only necessary to place the prisoner while in Canada on a vessel bound for a United States port, or even to take him to the boundary line and thrust him across. There was no breach of the treaty between Great Britain and the United States by the enactment of this statute, even if the treaty were in force, which is doubtful, because it was probably abrogated by the war of 1812, and was not revived by the subsequent treaties of 1814 and 1815. The right of citizens of the United States freely to pass and repass is not affected, but only their right to remain in Canada in certain circumstances. Canada has power to override these treaties under the B.N.A. Act—a charter which makes us supreme. The customs tariff laws, for example, are passed over the heads of treaties. The function exercised by the Attorney-General here is an executive function. He has been given absolute discretion, and that discretion is not subject to judicial control, but only to the authority of Parliament: *The Queen v. The Lords Commissioners of the Treasury* (1872), L.R. 7 Q.B. 387; *In re Massey Manufacturing Co.* (1886), 13 A.R. 446. The duty of the

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Attorney-General is not judicial, and therefore is not to be interfered with by a prerogative writ. The documents issued are not warrants in the ordinary sense. There is no power to review the procedure or the conclusions of the Attorney-General. Notice to the person to be deported is not required, because the functions exercised are not judicial: *Re Godson and City of Toronto* (1888), 16 O.R. 275, (1889), 16 A.R. 452, (1890), 18 S.C.R. 36. There is no requirement that the person should be found guilty of the offence of being in Canada in the circumstances mentioned in the statute. Whether the person comes within the Act is a matter solely for the Attorney-General. So is the question whether the United States statutes on the subject are "similar in character."

Robinson, in reply. The delegation to the Attorney-General is not in his executive capacity as an officer of the executive government, but as *persona designata*. As to the jurisdiction of the Court on *habeas corpus*, see Encyc. Laws of Eng., vol. VI., p. 131.

Mackenzie, in reply. Legislation cannot disregard treaties. The B.N.A. Act imposes the obligation to carry out treaties.

June 16. ANGLIN, J.:—Upon a return to writs of *habeas corpus*, counsel for the applicants move for their discharge from custody. Counsel representing the Attorney-General of Canada opposes the motion.

Because no appeal lies, as of right, from the order which I find myself obliged to pronounce, I regret that counsel were unable to accede to my suggestion, made upon the application for the writs of *habeas corpus*, that these writs should be returnable before a Divisional Court: R.S.O. 1897, ch. 51, sec. 67.

The applicants are in the custody of the Commissioner of Dominion Police under warrants of the Attorney-General couched in the following terms:—

"Canada.

"To the Commissioner of Dominion Police, or any Police Constable within Canada.

"Whereas it has been established to the satisfaction of the undersigned, the Attorney-General of Canada, that within the period of one year previous to the date hereof, to wit, on or

about the month of December, 1904, { James R. Gilhula }
 of Detroit, in the State of Michigan, one of the United States
 of America, at present of St. Thomas, in the Province of
 Ontario in the Dominion of Canada, being an alien or foreigner,
 and a citizen of the United States of America, a foreign
 country, which has enacted and retains in force laws or
 ordinances applying to Canada of a character similar to the
 Act passed in the 60th and 61st year of the reign of Her late
 Majesty Queen Victoria, chapter 11, intituled 'An Act to
 restrict the importation and employment of Aliens,' was by one
 the Père Marquette Railway Company, at St. Thomas, in the
 Province of Ontario, in the Dominion of Canada, unlawfully
 assisted or encouraged to enter or immigrate into Canada from
 the United States of America under contract or agreement
 made previous to the importation or immigration of the said
 { James R. Gilhula }
 { Everett E. Cain } to perform the service or labour of
 { chief despatcher }
 { train master } on the said Père Marquette Railway, in
 Canada, and that the said { James R. Gilhula }
 { Everett E. Cain } being an
 immigrant within the meaning of the said Act, and the Acts in
 amendment thereof, was thereupon, within the period aforesaid,
 to wit, on or about the month of December, 1904, aforesaid,
 allowed to enter into Canada from the United States of
 America, contrary to the prohibition of the said Acts, and that
 the said { James R. Gilhula }
 { Everett E. Cain } has remained and still is in
 Canada.

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"These are therefore to command you in His Majesty's
 name to take into custody the said { James R. Gilhula }
 { Everett E. Cain }
 and return him to the United States of America, and for so
 doing this shall be your sufficient warrant.

"Given under my hand and seal this 23rd day
 of May, in the year of our Lord 1905, at the city
 of Ottawa, in the Dominion of Canada aforesaid.

"C. Fitzpatrick,

(Seal)

"Attorney-General of Canada."

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Numerous grounds were urged in support of the motion, but, in the view which I take of the matter, it becomes unnecessary to deal with any ground other than that upon which I am about to dispose of it.

As amended by 1 Edw. VII. ch. 13, sec. 3, the 6th section of the 60 & 61 Vict. ch. 11 (D.) reads as follows:—

“The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership or company violating section 1 of this Act.”

This statutory provision contains the sole authority for the issue and enforcement of the warrants above set out. Its validity is impugned by the applicants upon the ground, *inter alia*, that, inasmuch as it purports to authorize the Attorney-General, or his delegate, to deprive persons against whom it is to be enforced, of their liberty without the territorial limits of Canada, it transcends the powers of the Dominion Parliament.

By the 91st section of the British North America Act the Parliament of Canada is empowered to make laws for the “peace, order, and good government of Canada” in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces: and it is by sub-sec. 25 given “exclusive legislative authority” in regard to “aliens and naturalization.” In many judgments the Privy Council has declared that our Parliament “has and was intended to have powers of legislation as large and of the same nature as the Imperial Parliament itself, the language of the British North America Act being “apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to:” *Riel v. The Queen* (1885), 10 App. Cas. 675; *The Queen v. Burah* (1878), 3 App. Cas. 889, 904; *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575, 588. But that the area within which the powers so conferred may be exercised is restricted to the territorial limits of the colony to whose

legislature they are granted, is equally well established. However general the language in which its jurisdiction is conferred, without an explicit bestowal of extra-territorial powers by the sovereign Parliament, no colonial legislature may enact legislation to be actively enforced beyond the boundaries of the colony: *Powell v. Apollo Candle Co.* (1885), 10 App. Cas. 282, at p. 290; *Low v. Routledge* (1865), L.R. 1 Ch. 42, at p. 47, *per* Turner, L. J.; *Routledge v. Low* (1868), L.R. 3 H. L. 100, at p. 116, *per* Lord Chelmsford; Forsyth's Constitutional Law, pp. 24, 465; Todd's Parliamentary Government in British Colonies, 2nd ed., pp. 159, 177-8; Dicey on The Constitution, 6th ed., p. 99n.

This is but one of the several restrictions necessarily flowing from the inherent condition of a dependency: *Regina v. Taylor* (1875), 36 U.C.R. 183, at p. 191; *Craw v. Ramsey* (1682), Vaughan 274, at pp. 292-3. Counsel for the Attorney-General was, therefore, well advised in conceding at bar that if the return of the immigrant to the country whence he came, prescribed by the 6th section of the statute, would necessarily involve his detention or subject him to constraint, by the agent of the Attorney-General, without the territorial limits of Canada, that provision is *ultra vires* of the Dominion Parliament.

Giving full effect to the argument of the learned counsel that, if at all possible, the statute should receive a construction consistent with jurisdiction, not desiring "to attribute to the colonial legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony:" *MacLeod v. Attorney-General for New South Wales*, [1891] A. C. 455, 457—I have striven to discover some means for the performance of that which the warrants to the Commissioner require him to do—viz., to take into custody the applicants and return them to the United States of America, whence they came—that would not involve an assumption of extra-territorial jurisdiction. In this I have failed.

Mr. Shepley argued that the requirements of the statute must be deemed satisfied if the "immigrant" to be deported is "put in course of return" to the country from which he came. I cannot so read the words "return to." If the constraining

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force of the officer acting under the Attorney-General's warrant ceases before the subject of it is within the territorial limits of the foreign country, I cannot understand how he can be said to be returned to that country by virtue of the warrant. If such force continues until the subject is upon foreign territory, its extra-territorial exercise cannot be denied.

In effecting the return of an "immigrant" to the United States it is suggested that the officer charged with that duty may take his subject in custody to the imaginary line forming the boundary, and then, remaining himself on Canadian territory, may push his prisoner across the line and into the United States. But, were it possible for the officer to eject a resisting alien without risk of projecting any part of his own person upon United States soil, in my opinion the application of the propelling force operating upon the person of the alien, while wholly or partly within the foreign territory, is an extra-territorial constraint of such alien by the Canadian officer, and as such cannot be authorized by the Dominion Parliament. Again counsel suggests that the officer may select such a point as Windsor for the deportation, and may discharge his duty by placing his alien prisoner upon a ferry-boat crossing the river to Detroit. Here the alien is upon Canadian territory until the middle of the stream is reached. If the custody ceases when the alien is placed on the ferry-boat, it cannot be said that he is returned to the United States by the officer charged with the execution of the warrant. If the custody continues until the ferry-boat reaches mid-stream—apart from the difficulty of determining the precise moment at which the boat crosses the imaginary line beyond which any constraint by Canadian authority is admittedly unwarranted, and the danger of an involuntary violation of United States territory—it is impossible to say that the deported subject is not under actual constraint imposed by Canadian authority until the boat reaches the Detroit docks. He is upon the ferry-boat not of his own volition, but because Canadian power has placed and kept him there. In theory his imprisonment may cease at the instant his body is carried over the border; in fact he is carried not to the border, but to the city of Detroit, in United States territory, by compulsion of Canadian law.

The difficulties of returning "immigrants" to countries separated from Canada by the high seas without exercising extra-territorial constraint are even greater. The statute extends to all foreign countries which have enacted and retain in force laws or ordinances applying to Canada of a similar character (sec. 9).

"In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them:" *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, 585. Discharging that function, I have reached the conclusion that the provision of the Dominion statute 60 & 61 Vict. ch. 11, for the return of certain "immigrants" to the country whence they came, is *ultra vires*.

Neither may that statute be invoked to justify the custody in which the applicants are held within Canada. This custody is merely a means to an end, that end being deportation. The applicants are not in custody for any other purpose. Their apprehension is authorized by the Legislature only as something subsidiary to their return to the United States. It follows that if the return itself cannot be legally effected, the detention for that illegal purpose is unwarranted.

The applicants are, therefore, in my judgment, entitled to an order for their immediate discharge—and that order I accordingly pronounce.

In addition to the authorities cited in the course of the foregoing opinion, I make the following references: *Ray v. McMackin*, 1 Vict. L.R. (Cases at Law) 274; *In re Gleich*, 1 O. B. & F. (S. C. N. Z.) 39; *In re Victoria Steam Navigation Board* (1881), 7 Vict. L.R. 248; Lefroy on Legislative Power in Canada, pp. 322 *et seq.*; *In re Criminal Code Sections Relating to Bigamy* (1897), 27 S.C.R. 461; *Regina v. Brierly* (1887), 14 O.R. 525; *Regina v. Plowman* (1894), 25 O.R. 656.

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RE HUYCK.

Will—Gift to Religious Society—"Charitable and Philanthropic Purposes"—Validity.

A testator gave his residuary estate "to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes, as said Monthly Meeting or Society may direct:"—*Held*, that the gift was not void for uncertainty as to its objects, but was valid.

Williams v. Kershaw (1835), 5 L.J. Ch. 86, 11 Cl. & Fin. 111n., 42 R.R. 269, not followed.

Decision of TEETZEL, J., affirmed.

MOTION by the executors of the will of Thomas Huyck, deceased, under Rule 938, for an order declaring the construction of the will. The facts appear in the judgments.

The motion was heard by TEETZEL, J., in the Weekly Court, on the 1st March, 1905.

J. R. Brown, for the executors.

G. H. Watson, K.C., for the charity.

W. E. Middleton and *P. C. McNee*, for other beneficiaries.

May 18. TEETZEL, J.:—Motion under Rule 938 for construction of the will of the late Thomas Huyck. The will is dated the 4th October, 1900, by which the testator gave all his real and personal estate to his executors upon trust to sell and to convert into money, and out of the proceeds he directs payment of his debts, funeral and testamentary expenses, and certain personal legacies, and then follows a gift of the residue of the said moneys to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes, as said Monthly Meeting or Society may direct.

By a codicil dated the 3rd December, 1904 (the day before the testator's death), the testator, after expressly revoking the said gift to the Friends' Society, gives some further money legacies, and closes his codicil as follows: "All the rest and residue of my estate not by me in my said will or by this my codicil thereto disposed of, I give and bequeath to the West

Lake Monthly Meeting of Hicksite Friends of West Bloomfield, to be applied or expended by the said Monthly Meeting or Society in charitable and philanthropic purposes, as the said Monthly Meeting or Society may direct. And I direct my said trustees to hand over the said residue to the trustees of the said Monthly Meeting or to such committee or trustees as the said Monthly Meeting may appoint to receive same. And I do hereby ratify and confirm my said will in all other respects."

The estate consisted of about \$5,800 personalty and \$1,600 realty. The question for determination is whether the residuary gift to the Society of Friends is valid.

It is not necessary to discuss the point urged by Mr. Watson that the codicil did not revoke the original gift contained in the will, but was only a repetition of or substitution for the prior gift, less the personal legacies given by the codicil, for, in my view, it is immaterial under the present law whether the testamentary assurance to a charity was made more or less than six months prior to the testator's death. In the judgment delivered by me to-day in *Re Barrett*,* I have given the reasons leading up to this conclusion, and the authorities considered are therein referred to.

I was at first very much impressed with Mr. Middleton's argument that this gift is void for vagueness and uncertainty in the objects to be benefitted, in other words, that the purposes of the gift were so indefinite as to make it impossible either for the persons authorized to distribute or for the Court to make selections with any certainty; that the word "philanthropic" is wide enough to comprise purposes which are not "charitable," within the meaning of that word adopted by the Courts in considering gifts to charity; and that the words "charitable" and "philanthropic" gave a discretion to select either "charitable" or "philanthropic."

In re Macduff, [1896] 2 Ch. 451, was a case in which it was held that a gift "for charitable or philanthropic purposes" was not a good charitable bequest, because there may be philanthropic purposes which are not charitable purposes. The case is instructive upon the respective meanings of the words

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"philanthropic" and "charitable." At pp. 469 and 470 Rigby, L.J., says: "Now, the cases with regard to charities are innumerable; but in the case of charities, as in all other cases, precedents are only useful in so far as they enable us to deduce a principle. No previous will can be treated properly as a precedent for another which is expressed in different language, and no decision on the precise words of a former will can as a general rule be of the least service in guiding the Court as to the construction of other words. Unless you can get a principle from a case which is applicable generally to other cases, the precedent is of little use. What principles do we find that are applicable to the present case? First of all, a bequest upon trust must be sufficiently certain to enable the Court to superintend and give effect to the trust according to its terms. That is a general principle that applies to all bequests, whether charitable or not; they must be sufficiently definite to enable the Court to carry the trust into effect. Then how do charity cases differ from general cases? As it appears to me, in this respect only—that when you get the idea of charity properly expressed in a will you have a standard to go by, and one that has been adopted now for centuries—that is to say, a standard afforded by the preamble to the Statute of Elizabeth, which deals with certain things specifically as instances of existing charities, and from which by analogy you can deduce that certain other matters are also to be treated as charitable. But before you can apply that rule you must find that idea of charity sufficiently expressed in the will, and it is not a good charitable gift if there is any alternative (I am now talking of substantial matters) allowed to trustees as to whether the purposes to which they apply the property which is devised to them are to be charitable or something else. If there is an alternative, the general rule comes in, that this is a matter too indefinite for the Court to give effect to it."

Other cases cited by Mr. Middleton were *In re Jarman's Estate*, *Leavers v. Clayton* (1878), 8 Ch. D. 584, where a devise was described as "any charitable or benevolent purpose," etc., and it was held that such devise was indefinite and inoperative. (This case was discussed in *Toronto General Trusts Co. v. Wilson* (1895), 26 O.R. 671; *Ellis v. Selby* (1836), 43 R.R.

188, where it was held that the trust was indefinite and could not be carried into effect, where the executors were to pay and apply the fund "for such charitable or other purposes as they may think fit:" *Williams v. Kershaw* (1835), 42 R.R. 269, where it was held that a gift "for such benevolent, charitable, or religious purposes as the trustees in their discretion should think most advantageous," was void for uncertainty. The Court expressed the opinion that the testator intended to restrain the discretion of the trustees only within the limits of what was benevolent or charitable or religious, and the discussion went on the ground that the gift introduced such a generality as to deprive it of its character as a charitable legacy and made it impossible for the Court to execute it. The case of *Grimond v. Grimond* (1905), 21 Times L.R. 323, a decision of the House of Lords, reported since the argument, decides that a gift "to such charitable or religious institutions and societies as the trustees may select," was void because the testator did not give his property to a class from the members of which the trustees would be at liberty to select, and was void by reason of vagueness and uncertainty.

It will be observed that in all these cases the conjunction "or" is used between the word "charitable" and the other descriptive word. I find no case where the word "and" has been used between the two descriptive words in which the gift has not been sustained, nor is there any case where the word "and" has been construed as giving a choice of purpose to the trustee, except *Williams v. Kershaw*, where three and not two descriptive words were used, and that case and *Ellis v. Selby* and *In re Jarman's Estate*, were cited in *In re Best*, [1904] 2 Ch. 354, in which it was held that the gift of residue upon trust for "such charitable and benevolent institutions" as the trustees shall determine is not void for uncertainty, but is a good charitable gift. Farwell, J., in delivering judgment, at p. 356, says: "Having regard to the curiously technical meaning which has been given by the English Courts to the word 'charitable,' I am not surprised that the testator should have desired that the institutions should be not only charitable, but should be also benevolent. There are certainly some which I think it would be difficult to say are benevolent, such as the

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distribution of the works of Joanna Southcote, although that was held to be charitable. I think the testator here intended that the institutions should be both charitable and benevolent; and I see no reason for reading the conjunction 'and' as 'or.' This decision followed *In re Sutton* (1885), 28 Ch. D. 464, in which the above cited case of *Williams v. Kershaw* was distinguished, and in which it was held that the following was a good charitable gift: "That the whole of the money over which I have disposing power be given in charitable and deserving objects." Pearson, J., in delivering judgment, at p. 465, says: "To my mind the words 'charitable and deserving objects' mean only one class of objects, and the word 'charitable' governs the whole sentence. It means objects which are at once charitable and deserving. If you were to treat the word 'deserving' as standing alone it would be so vague that I do not know what meaning could be attached to it." Speaking of *Williams v. Kershaw*, at p. 466, he says: "But, to my mind, there is an entire difference between a gift to the three purposes, 'benevolent, charitable, and religious,' without any conjunction, copulative or disjunctive, between the first two adjectives, as in *Williams v. Kershaw*, and the gift in the present case to 'charitable and deserving objects.' I agree with the Master of the Rolls that 'benevolent, charitable, and religious' means that the gift may be applied in any one of those three ways. But when, as in the present case, the copulative conjunction connects the words 'charitable' and 'deserving,' to my mind it changes the grammatical meaning altogether. The objects are to be at once charitable and deserving, and the testatrix shews that the class of objects which she wished to be chosen was to include those which should be both charitable and deserving, and in that way the gift will be good."

In the present case I think charity was the dominant idea in the mind of the testator, and while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic. For subjects possessing these common attributes reference need only be made to many valid charitable uses specified in sec. 6 of the Mortmain and Charitable Uses Act of 1902, Ontario, which is

an adaptation of the Statute of Elizabeth. Without, therefore, discussing either the scope or the limitation of the meaning of either of these words, I think that "charitable" was the controlling word in the mind of the testator, and that it governs the whole gift, which can with certainty be administered either by the persons charged with selecting the purposes, or by the Court. Reference may be also had to *In re Hunter*, [1897] 1 Ch. 518; *In re Douglas* (1887), 35 Ch. D. 472.

The order will be declaring the gift of the residue of the estate mentioned in the codicil to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield a valid gift. Costs of all parties to be paid out of the estate.

The beneficiaries other than the charity appealed from the decision of TEETZEL, J., and their appeal was heard by a Divisional Court composed of BOYD, C., MEREDITH and ANGLIN, JJ., on the 12th June, 1905.

W. E. Middleton, for the appellants.

G. H. Watson, K.C., for the executors and the charity.

The arguments and authorities cited are mentioned in the judgments.

June 14. BOYD, C.:—The testator, who was an illiterate man and marksman, disposes of the residue of his estate to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield, to be applied or expended by the society in "charitable and philanthropic purposes" as the society may direct. Mr. Justice Teetzel has held this to constitute a valid charitable bequest, and I think his judgment should be affirmed with costs. His construction of the will is in accord with the more modern authorities; and without authorities I should say that the proper meaning of the testator's words is to direct that his bounty should be expended in charitable purposes which are also in the judgment of the trustees of philanthropic character. He uses the conjunction "and" and not a word of disjunction, and he places the word "charitable" first, three times in the will and codicil, thereby giving it emphasis and predominance. The adjectives used, "charitable and philanthropic," do not require

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a disjunctive construction ; they may well be combined so as to be applicable to single institutions or objects of a charitable nature within the meaning of the statute which defines the meaning of a charity for testamentary purposes : R.S.O. 1897, ch. 333, sec. 6. The modern trend of decision is, if a will is of ambiguous import, so to read it as to support and not to frustrate the testator's intention.

Ample authority may be found for thus dealing with this will ; one of the earliest cases is *Jemmit v. Verril* (1826), Amb. 585 n. (Blunt's ed.) in which Sir J. Leach, V.-C., supported a bequest for "charitable and benevolent" purposes. This was followed by Farwell, J., in *In re Best*, [1904] 2 Ch. 355, and it is also in accord with the decision of Mr. Justice Pearson in *In re Sutton*, 28 Ch. D. 464, where the Vice-Chancellor's decision was not cited. The doubt cast upon *Jemmit v. Verril* by Lord Cottenham was not considered sufficient to discredit it as an authority.

The case relied upon by the appellant is a decision of Lord Cottenham, when Master of the Rolls, in *Williams v. Kershaw*, which is not found in the regular series of reports, though it appears in 5 L.J. Ch. 84 and in note printed 5 Cl. & Fin. 111. That case has been much criticized in the text books, and it is said to be the first case in which "and" of the testator has been construed "or" by the Court in order to work the destruction of the gift. See Boyle on Charities, p. 290, and also Perry on Trusts, who contends that the whole context of the will shewed a charitable use was intended : sec. 712. Altogether this case is one which, though not overruled, may be safely disregarded as of present authority. It was contrasted with the decision in *In re Sutton* by the Scotch Judges in *Cobb v. Cobb* (1894), 21 Rettie 638, with preference for the conjunctive construction of Mr. Justice Pearson as contrasted with the distributive construction adopted by the Master of the Rolls. In *In re Macduff*, [1896] 2 Ch. 451, the words used were "charitable or philanthropic," and that was held to be in the alternative and so inherently uncertain. Had the phrase used been as in this will, the result, I venture to think, would have been different : see *per Rigby, L.J.*, in that case, and what is said by Lord Davey in *Blair v. Duncan*, [1902] A.C. 37, at p. 44 : "If the words

used were 'charitable and public purposes' . . . effect might be given to them, the words being construed to mean charitable purposes of a public character."

The judgment is therefore affirmed with costs.

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MEREDITH, J.:—The difficulty in this case—and a serious one it is—arises from the use of words to which different minds may, not unreasonably, attribute different meanings. The words are, "in charitable and philanthropic purposes"—that certain moneys are to be so expended or properly employed. It is said that this must mean, and mean only, that each purpose must be both charitable and philanthropic: but would even a small minority of ordinary persons, reading the words without any knowledge of the questions raised or of what has been said on the one side and the other, so interpret them; would not rather a very large majority conclude that the money must be expended in charitable and philanthropic purposes without a thought that both purposes must concur in every object of the bounty? Would not most of us if we meant charitable philanthropy or philanthropic charity have omitted the needless conjunction? It is said that if both purposes were not to concur, the words should and would have been "in charitable or philanthropic purposes:" but I am not sure that that is so in either respect. Inaccuracy of expression is too common, with even the scholarly, to affirm the latter; and, as to the former, if the disjunctive conjunction were used, might it not be contended that the whole of the moneys must be expended or properly employed in one or other of the purposes, charitable or philanthropic, and that if part were to be expended in each, the copulative conjunction should have been used? If not, then how could it be provided, in as few words, that the whole benefit should go to charitable objects only or to philanthropic objects only? That the words in question mean more than merely "charitable" objects is self-evident, otherwise that word only should have been used; and it needs no illustration to shew that some philanthropic objects might not be charitable in their character: and one may be charitable in many ways and yet far from earning or deserving the title "philanthropist:" the words are not synonymous. In very

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few, if any, conversations or writings are all the words necessary for complete grammatical connection expressed; the conveniences and necessities of brevity demand that many be understood; and so, if one were told to expend money in charitable and philanthropic purposes, could he be well blamed for expending it in charitable, and also in philanthropic, purposes; if he acted as if the words used were, in charitable, and in philanthropic, purposes? The Act under which these charitable gifts have effect—see R.S.O. 1897, ch. 333, sec. 6—affords an apt illustration: there the copulative conjunction is almost invariably used, yet no one would think of interpreting it as it has been interpreted in this case; for instance, no one would think of interpreting the words “the maintenance of sick and maimed soldiers and mariners” as requiring one to be both sick and maimed, and soldier and sailor too, to come within their meaning. The addition of other purposes, and especially of purposes not as nearly alike as charitable and philanthropic, would strongly tend to shew that all the adjectives were not meant to apply to every object of the bounty.

But if the meaning were given to the words in question which I think a great majority of persons would, upon first reading them, attribute to them, that would render all of them wholly ineffectual: the will would be, as to the whole of the residuary estate, void. That could not have been the testator's intention; and where the words used are sufficient, as they are here, to warrant an interpretation which will not be in conflict with the law—which will give effect to the whole will—that interpretation may rightly, and in this case ought to, be employed.

For these reasons I agree in the result of the judgment of the learned Judge in the Weekly Court, and would dismiss this motion.

ANGLIN, J., concurred.

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[DIVISIONAL COURT.]

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May 10.

June 29.

Seduction—Evidence of Plaintiff's Daughter—Rape—Question for jury.

In an action by a father for the seduction of his daughter the jury disagreed, and a motion was made by the defendant, under Rule 780, for judgment dismissing the action.

The plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. The daughter was not in the plaintiff's service or living at home at the time of the seduction:—

Held, that it was for the jury to say, on the evidence of the daughter (even if no other evidence was given), whether or not they accepted her whole statement; they might be satisfied as to the connection and paternity, and discredit the evidence of force.

Vincent v. Sprague (1847), 3 U.C.R. 283, and *Brown v. Dalby* (1850), 7 U.C.R. 160, discussed.

Judgment of TEETZEL, J., reversed.

ACTION for seduction, tried before TEETZEL, J., and a jury at Brampton, on the 19th April, 1905. This was the third trial of the action, the jury having disagreed at the former trials, and also at this trial. The defendant after the third disagreement moved under Rule 780 for judgment dismissing the action. The facts are stated in the judgments.

T. J. Blain, for the plaintiff.

W. E. Middleton, for the defendant.

May 10. TEETZEL, J.:—This action is by a father for damages for the seduction of his daughter by the defendant. The case has been tried three times, and at each trial the jury disagreed. The last trial was before me at the Brampton assizes in April, and at the close of the plaintiff's case counsel for the defendant moved for a nonsuit, on the ground that the evidence of the daughter, if true, established a charge of rape and not of seduction; but, as a nonsuit had upon similar evidence been refused by each of the other learned Judges who tried the case before, I allowed the case to go to the jury without expressing any opinion upon the merits of the motion.

The present motion is by the defendant, under Rule 780 of the Judicature Act, which reads: "If the jury disagree and

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find no verdict, the Judge at or after the trial may, notwithstanding, dismiss the action."

It was argued by Mr. Blain, for the plaintiff, that this Rule only applies to cases which may be tried either by a Judge or a jury, and not to a case like this, which by statute must be tried by a jury.

I am not able to find from the cases cited or elsewhere anything affording a definition of the limits of the Rule.

In *Floor v. Michigan Central R.W. Co.* (1899), 30 O.R. 635, Street, J., at p. 637, in discussing the operation of the Rule, says: "I am unable to extend it beyond the case in which, after a trial by a jury and a disagreement, the Judge is of opinion that he should have withdrawn the issue from the jury instead of having submitted it to them." And, although the learned Judge was not able to say that the case should have been withdrawn from the jury, he intimated that if he had been trying it without a jury he would upon the evidence have dismissed the action. The judgment was sustained in appeal, (1900), 27 A.R. 122. In the judgment of the Court of Appeal, the history of the Rule is traced, and the learned Judges were unable to say that the trial Judge was wrong in submitting the case to the jury. At p. 127, the present Chief Justice of Ontario says: "It appears to me that the effect of the Rule is that the trial Judge is put in the place the Court was in under Rule 799 of 1888. He is given power to reconsider his decision at the trial to let the case go to the jury although there is no verdict, just as he may do where the jury has returned a verdict for the plaintiff, . . . and if upon reconsideration he comes to the conclusion that he was wrong, he may do as he should have done at the trial."

I think this is a case in which the Rule applies, and I am of opinion from further consideration of the evidence given on behalf of the plaintiff only, and in view of the authorities cited upon this motion, that I should not have allowed the case to go to the jury.

The evidence of the plaintiff's daughter was most emphatic that the connection effected by the defendant with her was by force and without her consent, and there was no evidence given either by her or any one else from which a jury, in my opinion,

would be justified in finding that she had consented, either by act or word, to the connection.

Her whole story as to the circumstances of the alleged sexual intercourse by the defendant was highly improbable, but, if believed at all, could only lead to the conclusion that the defendant had committed the offence of rape, and it would seem to me that a jury could not find that the act of seduction had been committed by the defendant without discarding entirely the evidence of the particulars given by the daughter and guessing at an entirely different set of circumstances.

The case of *Vincent v. Sprague* (1847), 3 U.C.R. 283, first cited upon this motion, seems to me to be a conclusive authority against the plaintiff's right to recover in this action, and if my attention had been drawn to it at the trial a nonsuit would probably have been granted. It was conceded upon the argument that it had not been cited at either of the trials.

In that case, as in this, the plaintiff's daughter swore that the act of connection was accomplished by force and against her will, and would not admit by any means that she was consenting; and Robinson, C.J., in delivering judgment says: "The case then, as she stated it, was not one of seduction, but a felonious charge." And at p. 284, speaking of the plaintiff, the learned Chief Justice further says: "He was bound to prove the civil trespass charged, by some witness, but he proved it by none; and what he contends is, that the jury might and ought to have inferred in his favour a fact which nobody proved, and might upon her evidence alone have given damages for her seduction, while she swore that she was not seduced, and there was no other evidence to prove that she had been. It is no doubt correct to say, that although a jury must have the whole of a witness's statement, they are not bound to believe it all, but may accept part of it as true, and discredit the rest; but then, if what the witness before them has sworn not to have taken place be essential to the action, it must be proved by some one else. A jury cannot found their verdict affirming a certain fact upon the mere disbelief of the witness who denies it. . . . When it is necessary to prove a fact affirmatively, in order to found a verdict upon it, some proof must be given of it: the proof cannot consist merely in calling on the jury to disbelieve

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all that is sworn to respecting it." The plaintiff was nonsuited at the trial, and on appeal the nonsuit was sustained.

The action of seduction is predicated upon the consent of the party seduced having been given either by act or word. In this case the daughter was over twenty-one years of age at the time of the alleged seduction, and was not in the actual employment of the father, but was at service at the house of the defendant's father.

The right of the father to recover is a statutory one, and in order to enable him to succeed the fact of seduction must be proved; and, the daughter not being his servant in fact, he would not be entitled to recover damages for an assault upon her. Any damages resulting to her from acts which would amount to rape, although pregnancy might follow, would be personal to her and would not accrue to the father.

It has been judicially stated that "in order to constitute seduction, the defendant must use insinuating arts to overcome the opposition of the seduced, and must by wiles and persuasions without force, debauch her." Also, "in order to constitute seduction it is necessary to shew that the consent of the woman was obtained by flattery, promises, or other artifices used by the defendant." Also, "the word 'seduction,' when applied to the conduct of a man towards a female, is generally understood to mean the use of some promise, arts, or means on his part by which he induces the woman to surrender her chastity and virtue to his embraces." For these and other similar definitions, see "Words and Phrases Judicially Defined," vol. 7, p. 6389 *et seq.*

The actions of the defendant in this case, as sworn to by the plaintiff, are absolutely inconsistent with the above or any other definition of seduction that I have been able to find.

Cole v. Hubble (1894), 26 O.R. 279, was an action by a father originally for the seduction of his daughter, who, at the time, was in his actual employment. At the trial the evidence disclosed that the connection with the daughter constituted in law a charge of rape. At the close of the case the learned Judge allowed the plaintiff to amend by setting up as an alternative cause of action the enticing away of the daughter, followed by the connection with her by force and against her will, and the

consequent loss of service. The jury found affirmatively that the defendant did ravish the plaintiff's daughter against her consent, and awarded \$250 damages. At p. 282 Meredith, J., says: "It is true that in actions for seduction only, if rape only be proved, the plaintiff must fail: seduction and rape are inconsistent; but if there is any reasonable evidence upon which seduction only might be found, the case should go to the jury," citing *The Queen v. Doty* (1894), 25 O.R. 362.

I am of opinion that in this case there was no reasonable evidence upon which seduction only could be found by the jury. Outside of the evidence of the plaintiff's daughter, there was nothing which would support the suggestion of the defendant having seduced her, and there was no part of the daughter's evidence, improbable and unnatural as the circumstances narrated by her were, that would justify the jury in finding that she was induced to surrender or did voluntarily surrender her chastity and virtue to the embraces of the defendant.

I think, therefore, I should at the trial have withdrawn the case from the jury, and I now direct the action to be dismissed with costs.

The plaintiff appealed from the judgment of TEETZEL, J., and his appeal was heard by a Divisional Court composed of BOYD, C., ANGLIN and MAGEE, JJ., on the 13th June, 1905.

T. J. Blain, for the plaintiff, contended that the case was not one for the application of Rule 780, citing Rule 799 of the Con. Rules of 1888; *Floer v. Michigan Central R.W. Co.*, 30 O.R. 635, 27 A.R. 122; *Casey v. Canadian Pacific R.W. Co.* (1888), 15 O.R. 574; also that the question whether the evidence shewed seduction or rape, and the credit to be given to the plaintiff's daughter, was for the jury, citing *Cole v. Hubble* 26 O.R. 279; 21 Am. & Eng. Encyc. of Law, pp. 1022, 1024; *Vincent v. Sprague*, 3 U.C.R. 283; *Hayle v. Hayle* (1834), 3 O.S. 295; *Brown v. Dalby* (1850), 7 U.C.R. 160; *Walsh v. Natrass* (1869), 19 C.P. 453; *Williams v. Robinson* (1869), 20 C.P. 255; *The Queen v. Doty*, 25 O.R. 362.

W. E. Middleton, for the defendant. The fact of the seduction having occurred must be proved. The plaintiff's witness

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having given evidence which, if believed, shews that rape was committed, his case fails. Besides the cases already referred to, he cited *Davies v. Williams* (1847), 10 Q.B. 725; *Whitbourne v. Williams*, [1901] 2 K.B. 722; *Dublin, etc., R.W. Co. v. Slattery* (1878), 3 App. Cas. 1155, 1201; *Hopkinson v. Perdue* (1904), 8 O.L.R. 228, 230.

June 29. BOYD, C:—One is reluctant to prolong such litigation as this, and especially so where three abortive trials have already been had, but I feel unable to uphold the judgment in appeal (under Rule 780 or otherwise) directing that the action be dismissed.

The action is by the father, and the chief witness on his behalf is the daughter. Her evidence, if believed, shews carnal connection with her by the defendant, and that he is the father of her child. That is enough, if believed, to answer some of the issues raised in her favour. But her evidence goes further and shews that she was forced against her will by the defendant, and that, if believed, may very well establish a case of ravishment and not of seduction under the statute. Apart from this element of force, there is sufficient evidence, if believed, to shew a case of seduction, and justify a right to recover under the Ontario statute. But the learned Judge has taken upon himself the burden of determining whether or not, upon the whole evidence, rape has been proved, and, finding that it has, he dismisses the action. But this question, on the whole evidence, is one that should be passed upon by the jury; they may be satisfied as to her truthfulness concerning the paternity, and discount that part of her evidence which shews her resistance, and impute that to a strong desire to stand well with her own family and friends.

The decision on which he proceeds of *Vincent v. Sprague*, 3 U.C.R. 283, is qualified and explained by the later case in the same Court of *Brown v. Dalby*, 7 U.C.R. 160, 162, which is more in point as to the facts of this case. The Chief Justice says: "If, for instance, the witness had described the act as having taken place in the same room where several other persons were sleeping, who could have been easily aroused by her calling, she might still have chosen to say that the act was

committed violently and against her will ; but the jury, while they believed the other facts of her statement, might disbelieve her in that part."

I should be disposed to put the matter even more broadly, and to this effect, that it would be a matter for the jury always to say, on the evidence of the girl (even if no other evidence was given), whether or not they accepted her whole statement in a case where they were satisfied of the paternity and she attributed the act of connection to the force or violence (greater or less) of the defendant.

So far as right of action by the parent for loss of services in such cases is concerned, I think the law is correctly laid down in *Kennedy v. Sheu* (1872), 110 Mass. 147, 151, thus: "The gist of the action is the debauching of the daughter, and the consequent supposed or actual loss of her services. It is immaterial to the plaintiff's claim under what special circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie, although trespass *vi et armis* might have been sustained. It would be no defence, that the crime was rape, and not seduction. The father in such cases may always seek his remedy in action on the case." And to the same effect *Damon v. Moore* (1871), 5 Lans. (N.Y.) 454. That is, in older pleading, it went but to the form of the action ; now the only question is whether the plaintiff can get the benefit of the presumption of service given by the Ontario statute if it turns out that the circumstances of the carnal intimacy amounted to more or less than seduction.

If it is not a case of seduction under the statute, evidence of loss of service would be required : see *Cole v. Hubble*, 26 O.R. 279 ; *Appleby v. Franklin* (1885), 17 Q.B.D. 93 ; *Hill v. Wilson* (1846), 8 Blackf. (Ind.) 123.

Here I think the question of rape or seduction could not be taken from the jury. The old cases, *e.g.* *Ross v. Merritt* (1846), 2 U.C.R. 421, depend partly on the rule supposed to exist, that if rape was proved "the trespass merged into felony," and in the later decisions subsequent to *Brown v. Dalby* upon the theory that it was for the Court during the trial to interpose if the evidence of the girl proved that a felony had been committed. It was not a matter of defence, but one depending upon

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public policy and the vindication of the criminal law. All that has been changed by the enactment of the Criminal Code, sec. 534, that no civil remedy for any act shall be affected or suspended by reason that it amounts to a criminal offence.

The evidence of the girl in this case shews approaches made to her on evenings before the consummation, and no complaint made. That might be the beginning of the seduction or enticement, in its primary sense, which would be enough to bring the case within the statute, if the man's conduct did not end in violence amounting to a crime. That, I think, it is for the jury to pronounce upon: see *Furman v. Applegate* (1850), 3 Zab. (N.J.L.) 28; *Vanhorn v. Freeman* (1796), 1 Halst. (N.J.L.) 322; *Brown v. Dalby*, 7 U.C.R. 160. See also cases cited in *The Queen v. Doty*, 25 O.R. 362, especially *Wilkinson v. Dutton* (1863), 3 B. & S. 821.

I would vacate the judgment, so that, if the parties desire further litigation, the case may go down to another jury, but in such case I would advise that the venue be changed to another county remote from the scene of action.

There will be no costs of this appeal, as the law is in a somewhat unsettled state on this point.

ANGLIN, J.:—The learned trial Judge granted the defendant's motion made pursuant to Con. Rule 780 and dismissed this action, because, in his opinion, the decision in *Vincent v. Sprague*, 3 U.C.R. 283, is conclusive in the defendant's favour. In that case the full Court—Macaulay, J., *dubitante*—held that where the only evidence adduced by the plaintiff in an action for seduction is that of his daughter, and her story absolutely negatives consent to the embraces of the defendant, and, if true, fixes upon him the crime of rape, the trial Judge is bound to withdraw the case from the jury and may not leave it to them to find “a verdict affirming a certain fact upon the mere disbelief of the witness who denies it.”

It is not altogether clear that this decision should not, in part at least, be ascribed to the rule which, where the facts established in evidence adduced by a plaintiff claiming civil redress, constituted a criminal offence, required that the vindication of public justice should precede the recovery of damages for

any civil wrong involved: *Taylor v. McCullough* (1885), 8 O.R. 309. See sec. 534 of the Criminal Code. But, assuming such consent as will negative the crime of rape to be an essential feature of the carnal connection which forms the principal element of the actionable wrong known as seduction, and that the decision in *Vincent v. Sprague* proceeded solely upon the fact that the existence of this indispensable part of the plaintiff's cause of action was inconsistent with the only evidence there before the Court, with very great respect for the learned trial Judge, I am unable to agree with his view that *Vincent v. Sprague* concludes the present case in favour of the defendant.

Were the girl's evidence alone before us, to satisfactorily distinguish this case from the decision of 1846 might be difficult. But the present defendant did not choose to rely upon the weakness of the plaintiff's case. He called witnesses on his own behalf, and upon their evidence many facts appear which would justify a conclusion that a rape could not have been committed by the defendant, as alleged by the plaintiff's daughter. Upon the evidence as it stands to-day no jury would, in my opinion, return a verdict of guilty, were the defendant on his trial on a charge of rape. Yet if, disbelieving the defendant's absolute denial of the girl's entire story, the jury had in this action returned a verdict for the plaintiff, I am inclined to think that verdict could not have been successfully attacked upon the ground that there was no evidence to support it.

The evidence that, consent being withheld, connection was had by force, is that not of the plaintiff, but of his daughter. Other evidence, direct or circumstantial, may be adduced to shew that upon this point the witness is mistaken or 'untruthful': *Stanley Piano Co. v. Thomson* (1900), 32 O.R. 341. Such evidence has been given and is before us. Perhaps, in view of that evidence, it would be safer to reject the woman's story in its entirety. But that is eminently a matter for the consideration of the jury. If the jury—regarding the discredited portion of her tale as something to which she was driven by an overpowering sense of shame—while rejecting it had nevertheless accepted her evidence that the defendant is the father of her child, I am unable to say that an appellate court would have been obliged to set aside a verdict for the plaintiff as one which

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no ten reasonable men could find. Because sitting as jurors we should upon the evidence as a whole have reached a different conclusion, it does not at all follow that we should usurp the functions of the jury and substitute our view for theirs.

Expressing no opinion upon the duty of the trial Judge where evidence identical with that in *Vincent v. Sprague* is presented, I cannot, upon the evidence now before us, say that, assuming consent of the woman to be essential to the actionable wrong known as seduction, there is no evidence from which an inference of such consent could reasonably be drawn.

There must, therefore, be a new trial.

I entirely concur in the opinion that a change of venue is most desirable before this action is again and for the fourth time presented to a jury.

MAGEE, J., concurred.

T. T. R.

[IN CHAMBERS.]

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Sept. 16.

Distribution of Estates—Intestacy—Children of Father's Sister, and Grandchildren of Mother's Brother and Sisters—Devolution of Estates Act R.S.O. 1897, ch. 129, secs. 37 to 55—Statute of Distributions 22 & 23 Car. II., ch. 10.

The word "prospectively" contained in sec. 37 of the Devolution of Estates Act, R.S.O. 1897, ch. 129, does not exclude the operation of the Statute of Distributions 22 & 23 Car. II., ch. 10, by making secs. 38 to 55 of the Devolution of Estates Act applicable to descents subsequent to 1886, such word having reference prospectively to the period from 1852 to 1886.

An intestate's father and mother were both dead, the intestate's estate consisting of real and personal property coming from neither of them, and the intestate's nearest relatives were children of the father's sister, and grandchildren of the mother's brothers and sisters; the children of the deceased sister were held to be entitled to the exclusion of the grandchildren.

This was an application by the administrator of the estate of Isabella McEachern, deceased, for the administration and distribution of her estate, consisting of about \$3,000.00 personality and \$300.00 realty, and which came to her on the part of neither parent.

Isabella McEachern died intestate and unmarried. There were two daughters of a deceased sister of the intestate's father, and sixteen or more grandchildren of deceased brothers and sisters of the intestate's mother. The intestate's father and mother were dead. No brothers or sisters, or children of such, survived her.

The question was whether the sixteen grandchildren of the brothers and sisters of the intestate's mother, were entitled to participate, by representation of their deceased parents, with the two daughters of the deceased sister of the intestate's father, in the distribution of the estate.

On September 16th, 1905, the application was heard before FALCONBRIDGE, C.J.K.B., sitting in Chambers.

E. A. Forster, for the administrator.

Robert Wardrope, for the two daughters of the deceased sister of the intestate's father.

W. B. Raymond, for the sixteen grandchildren of the intestate's mother's deceased brothers and sisters.

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The following cases were referred to:—*Bowers v. Littlewood* (1719), 1 Peere Wms. 593; *Crowther v. Cawthra* (1882), 1 O.R. 128; *Walker v. Allen* (1897), 24 A.R. 336; *Re Colquhoun* (1895), 26 O.R. 104; Devolution of Estates Act, R.S.O. 1897, ch. 129, secs. 6, 37 and 53; Statute of Distributions, 22 & 23 Car. II. ch. 10; R.S.O. 1897, vol. III., ch. 335.

September 16. FALCONBRIDGE, C.J. (oral):—I am of the opinion that there is no representation of collaterals of this class, and that the two daughters of the deceased sister of the intestate's father take to the exclusion of the sixteen grandchildren of the deceased brothers and sisters of the intestate's mother. The Statute of Charles being in force here is applicable to the present case. The word "prospectively" in sec. 37 of the Devolution of Estates Act* does not exclude the operation of the Statute of Charles by making applicable secs. 38 to 55 of the Devolution of Estates Act to descents subsequent to 1886, the word having reference to the period prospectively from 1852 to 1886.

Costs of all parties to be paid out of the estate.

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*37. The twenty-seven sections numbered from 41 to 67, both included, shall apply retrospectively to the first day of January, A.D. 1852, inclusive, and also prospectively, as the case may be, and shall be construed as if the same had been passed on the said first day of January, 1852, but sections 38 to 55, inclusive, shall not apply to estates of persons dying on or after the 1st day of July, 1886; and sections 56 to 67, inclusive, shall, as to the estates of such last mentioned persons, apply only subject to the provisions of sections 1 to 21, inclusive.

[MACMAHON, J.]

HILL'S CASE.

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Nov. 11.

Company—Winding up—Contributory—Allotment—R.S.O. 1897, ch. 191, sec. 26.

A subscriber for a share in a company was debited in the company's stock ledger with one share, was placed on the "shareholders' list," and was drawn upon for the first payment of ten per cent. and paid the draft. There was no formal allotment to him:—

Held, that what had been done must be taken to have been done by authority of the directors and to be a mode of allotment "ordained" by them within the meaning of the Companies Act, R.S.O. 1897, ch. 191, sec. 26.

AN appeal by the liquidator from the report of J. A. McAndrew, Esquire, Official Referee, dismissing the liquidator's application to place one Hill on the list of contributories, was argued on the 18th of October, 1905, before MACMAHON, J., in whose judgment the facts are stated.

H. McP. Clark, for the liquidator.

C. S. MacInnes, for Hill.

November 11. MACMAHON, J.:—Hill signed an application for stock in the company on a form which reads:—

"I hereby subscribe for one share of the Provincial Grocers, Limited (or any less number which the directors may allot me), for which I agree to pay \$100 per share in payments as follows: 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors may deem advisable.

"I enclose herewith the sum of.....dollars, being 10 per cent. of my subscription.

"Dated Pontypool this 21st day of June, 1904."

On receipt of the application, Hill's name was placed on the "shareholders' list" of the company, under date of June 21, 1904, as a subscriber for one share of stock, and opposite thereto his address as "Pontypool." There had also been entered at the same time a credit for the payment of the first call of ten per cent. as having been received. This was credited in error and had been erased.

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An account was also opened in Hill's name in the company's stock ledger, where he is debited "To stock, \$100."

On the 20th of July, 1904, the company wrote to Hill that they had drawn on him for the first payment of \$10, "for one share of the capital stock." That draft was dishonoured. But on being drawn upon a second time by the company for the \$10, Hill paid the draft on the 10th of August.

The minute book of the company shews that at a meeting of the board of directors of the company held on the 8th of July, 1904, a resolution was carried providing: "that all parties who had applied for stock since May 18th and have made the necessary payment have their stock allotted."

At the time that the above resolution was passed, Hill had not made the first payment of 10 per cent. on his stock, and did not, as already stated, make that payment until the 10th of August, so that he did not come within the terms of that resolution, and there appears to have been no resolution of the board directing any allotment of shares after the 8th of July.

The Ontario Companies Act, R.S.O. 1897, ch. 191, sec. 26, provides: "If the letters patent or special Act make no other definite provision, the shares of stock of the company, so far as they are not allotted thereby, shall be allotted when and as the directors by by-law or otherwise ordain."

When an application is made for stock, there must be some act of the directors shewing that the application has been accepted and the stock allotted; and where no by-law has been passed by the directors allotting the stock, then the question as to whether the directors have "otherwise ordained" the allotting to the applicant must be determined by what they have done.

The Act in force when *Denison v. Leslie* (1879), 3 A.R. 536, was decided, was R.S.O. 1877, ch. 150, sec. 34, which is the same as sec. 26 of the present Act, and Moss, C.J.A., in delivering the judgment of the Court in that case said, at page 545: "During the argument I felt some doubt whether anything more was necessary to complete the liability of the defendant than the mere fact of recording him as the holder of, and thus allotting to him, ten shares. Further consideration, however,

has satisfied me that the Court below was quite right in holding that the additional fact of communication in some manner to the defendant was essential.”

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Now, in the present case Hill was recorded in the shareholders' list or register of the company as the holder of, and thus there was allotted to him, one share of the stock. There is in addition the communication by the company to him the fact of his being a shareholder, and there is the further fact that he paid the first call of ten per cent. on the share so allotted to him.

As to what constitutes an allotment, Mr. Justice Chitty in *Nicol's Case* (1884), 29 Ch. D. 421, at p. 426, said: "There is no difference, as has been often pointed out, between a contract to take shares and any other contract. What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer, and is now bound by the acceptance, is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract. As Lord Justice Baggallay

MacMahon, J. said in *In re Scottish Petroleum Company* (1883), 23 Ch. D. 413, at p. 430, 'to constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made.' There Lord Justice Baggallay used the term 'allotment' in what appears to me to be the proper sense of the term. It is only as constituting one of the steps which go to form a complete contract."

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Mr. Justice Chitty's judgment was affirmed by the Court of Appeal, (1885), 29 Ch. D. 439.

See also the judgment of Stirling, J., in *In re Great Northern Salt and Chemical Works* (1890), 44 Ch. D. 472, at p. 483.

Sec. 53 of the Winding-up Act is copied from sec. 154 of the English Companies Act, 1862, and provides: "If the business of a company is being wound up under this Act, all books of the company and of the liquidators shall, as between the contributories of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded."

In *Knight's Case* (1867), L.R. 2 Ch. 321, the articles of association of the company provided that the shares of a shareholder who failed to pay any call might be forfeited by a resolution of the directors to that effect. There was no entry in the minutes of any resolution having been passed by the directors or any notice of any forfeiture having been sent to Knight, but the secretary made entries in the books of the company that the shares were forfeited and had been transferred to the company. It was held that the entry of forfeiture in the books could not have been properly made without a resolution of the directors of the company, and that the Court was bound to assume that such a resolution was passed. And in *In re Great Northern Salt and Chemical Works*, 44 Ch. D. 472, where there was no record of a board meeting shewing an allotment of stock to Kennedy, but his name appeared in the allotment book of the company for 200 shares, Stirling, J., said that the books of the company constituted

prima facie evidence of the allotment under sec. 154 of the Companies Act, and that the entry of a resolution in a minute is not essential.

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What was done by the secretary of the company in the present case was to place Hill on the list of shareholders, to notify him of the receipt of his application for one share of stock, to place him on the shareholders' list or register, and to draw on him for the first payment of ten per cent., which he paid, the amount being placed to his credit in the ledger where he is debited with \$100 for the one share of stock. All these acts must be regarded as evidence that the directors instead of passing a by-law had "otherwise ordained" the allotment of the one share of stock to Hill. In other words, what the directors had done as disclosed in the entries in the books must be considered as equivalent to passing a by-law.

The appeal must be allowed with costs, and the respondent placed on the list of contributories for the sum of \$90.

R. S. C.

[MACMAHON, J.]

REX v. TUCKER.

1905

Oct. 28. *Sessions—Summary Conviction—Appeal to Sessions—Form of Recognizance—Payment of Fine—Repayment on Allowance of Appeal—Costs—Public Schools Act, sec. 103.*

A person elected as school trustee, who has under the provisions of sec. 103 of the Public Schools Act (R.S.O. 1897 ch. 292), been ordered by a justice of the peace to pay a fine of \$20 because of alleged refusal to perform the duties of the office has, having regard to the provisions of sec. 7 of the Ontario Summary Convictions Act (R.S.O. 1897, ch. 90), a right to appeal to the general sessions.

Payment of the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress.

In re Justices of York and Peel, Ex parte Mason (1863), 13 C.P. 15, followed, *Rex v. Neuberger* (1902), 9 B.C.R. 272, distinguished.

A recognizance to appear at the general sessions and "enter an appeal," is sufficient.

Rex v. Geiser (1901), 21 C.L.T. Occ. N. 604, distinguished.

Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered.

Regina v. McIntosh (1897), 28 O.R. 603, followed.

MOTION by the private prosecutor for an order for the issue of a writ of certiorari to remove into the High Court the conviction of the defendant before W. H. Lowes, Esquire, a justice of the peace for the county of Wellington on the 12th of January, 1905, the recognizance entered into by the defendant, and the proceedings and evidence before his honour Judge Chadwick, chairman of the court of general sessions of the peace, and his order made thereon upon the appeal of the defendant from the said conviction to the said court of general sessions of the peace, tried before his honour Judge Chadwick as chairman of the general sessions of the peace on the 13th and 14th of June, 1905.

The motion was argued before MACMAHON, J., in Chambers, on the 20th of October, 1905.

J. J. Drew, for the applicant.

W. M. Douglas, K.C., for the defendant.

October 28. MACMAHON, J.:—The grounds upon which the motion was made are: (1) The recognizance entered into by the said Tucker with sureties does not comply with the

requirements of the Act in that the condition thereof does not require the said Judge to try the said appeal. MacMahon, J.

(2) That Tucker having paid the fine under the conviction appealed from, submitted to the conviction and thereby barred his right of appeal, if any.

(3) That the court of general sessions of the peace or the chairman thereof had no jurisdiction to adjudicate upon and adjudge the repayment by the said justice of the peace of the fine and costs so paid by the said Tucker.

(4) That the proceedings before the justice of the peace from whose conviction the said Tucker appealed are not those respecting summary convictions but civil proceedings for the recovery of damages, fixed by 1 Edw. VII. ch. 39, sec. 109, (O.) and an appeal does not lie from such proceedings.

The appellant, John Tucker, was on the information of Christopher Irving prosecuted before W. H. Lowes, police magistrate for the county of Wellington, for that being a person who had been elected as a school trustee for school section number 18 in the township of Peel, in said county, he on the 5th of January, 1905, refused or neglected to perform the duties of the said office by refusing or neglecting to engage a teacher, and by not providing the necessary school accommodation for said school.

For this offence he was convicted and fined \$20 and costs, which he paid, under the circumstances hereinafter stated.

After his conviction Tucker entered into a recognizance with two sureties, the condition of which is as follows:

"The condition of the above recognizance is such that if the said Tucker personally appears at the next general sessions of the peace to be holden at Guelph on the 13th day of June instant, 1905, in and for the said county of Wellington, and enter an appeal against a certain conviction bearing date the 12th of January, 1905, and made by W. H. Lowes, one of His Majesty's justices of the peace. . . and also abide by the judgment of the court upon such appeal and pay such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue."

As to the first ground: Sec. 880 (c) of the Criminal Code provides that the appellant shall enter into a recognizance

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MacMahon, J. "conditioned personally to appear at the said court and to try such appeal and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court," etc.

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The condition in the recognizance entered into is to "personally appear at the next general sessions and enter an appeal against," etc. The words "and try" being omitted after the word "enter," without which, it was urged, the chairman of the general sessions had no authority to hear the appeal, and the case of *Rex v. Geiser* (1901), 21 C.L.T. Occ. N. 604, was cited in support of that contention. In that case the defendant had been convicted of an offence under the Act to restrict the importation of aliens, and applied to the justice to sign and state a case for the opinion of the court. Sec. 900 of the Code requires that the appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall enter into a recognizance before such justice conditioned to prosecute his appeal without delay. Instead of entering into a recognizance as required by the above section, the appellant deposited a marked cheque for \$100 with the convicting magistrate. It was held that the recognizance was a condition precedent to the jurisdiction of the court to hear the appeal, and that no substitute was permissible.

In that case, no recognizance having been entered into, objection was taken to the hearing of the appeal because of non-compliance with the requirements of the statute, and effect was given to the objection and the appeal dismissed. But in the present case a recognizance was entered into, no objection was taken to its sufficiency, the appeal was duly entered and tried, and the conviction of the appellant quashed. The appeal having been entered according to the condition in the recognizance, and the appellant having appeared to prosecute the appeal, the sessions could not refuse to try the appeal. And had the appeal failed and the court had ordered the appellant to pay the costs, he would under the condition in the recognizance have been compelled to pay the same.

As to the second ground : The conviction directs that if the fine and costs are not paid forthwith, the same are to be levied of the goods and chattels of the said John Tucker. The fine and

costs were paid immediately after the conviction of the appellant, and the examination of the appellant and several witnesses who were present at the time the fine and costs were paid was put in on the motion. James Farrelly and Richard Hanna say that Tucker, immediately after payment of the fine and costs, asked what time was allowed in which to appeal, and the magistrate informed him of the time within which notice of appeal must be given. Tucker says he paid the fine and costs because they were payable forthwith, and were, he considered, paid under compulsion, and when paying the amount to the magistrate he intended entering an appeal against the conviction, and asked within what time the appeal must be entered, and the magistrate informed him. Tucker is corroborated by Robert McQueen. Tucker intimated his intention to appeal, and carried out his intention by entering into a recognizance, and entered his appeal within the time required by the statute, and there was no waiver of his right to appeal. The point is concluded by the judgment in *In re Justices of York and Peel, Ex parte Mason* (1863), 13 C. P. 15. In *Rex v. Neuberger* (1902), 9 B. C. R. 272, the defendant paid his fine with the intention of so doing, and because of that and for the other reasons stated in the judgment, it was held that the appeal did not come within the purview of sec. 880 of the Code.

As to the third ground: The general sessions by its order ordered and directed that the conviction of the appellant (Tucker) be quashed, and also directed that the respondent do pay to the appellant the sum of \$39.65, the costs of the appeal, which the court had authority to do: see *Regina v. McIntosh* (1897), 28 O.R. 603.

The sessions also ordered that the fine and costs recovered against Tucker by virtue of the conviction against him be refunded to him, and that the said sums be paid to the clerk of the peace by a day named therein to be handed over to Tucker, the appellant.

The conviction having been quashed, it follows that the fine and costs paid by Tucker must be repaid to him, and even if the direction to that effect contained in the order was improper, its inclusion would not have vitiated the rest of the order, as it can be treated as surplusage: *Paley on Convictions*, 8th ed., p.

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MacMahon, J. 192, citing *Rex v. Hall* (1786), 1 T.R. 320, and *Regina v. Huntley* (1860), 29 L.J.M.C. 70.

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Then as to the fourth and last objection: By sec. 103 of the Public Schools Act, R. S. O. 1897, ch. 292, every person elected as trustee who has not refused to accept the office, and who at any time refuses or neglects to perform his duties, shall forfeit the sum of \$20, to be sued for and recovered before a justice of the peace by the trustees, or by any person whatsoever for the purposes of such trustees.

It was for the alleged neglect or refusal of Tucker to perform his duties as trustee that he was convicted and the \$20 fine inflicted. And under R.S.O. 1897, ch. 90, sec. 7, any party who considers himself aggrieved by a conviction or order of a justice of the peace under any statute in force in Ontario, and relating to matters within the legislative authority of the Legislature of Ontario, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the general sessions of the peace.

There is no provision in the Public Schools Act which alters or limits the effect of the above section.

The application must be dismissed with costs.

R. S. C.

[DIVISIONAL COURT.]

GEIGER V. GRAND TRUNK R.W. Co.

D. C.

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*Damages—Nervous Shock—Impact—Railway.*March 14.
Oct. 17.

The plaintiffs were driving on a highway in an enclosed vehicle which owing, as was found, to the negligence of the defendants, was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side by another car moving in the opposite direction. The plaintiffs suffered no visible bodily injuries except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor:—

Held, that damages of this kind were not recoverable notwithstanding the impact and the bodily injuries.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, and *Henderson v. Canada Atlantic R. W. Co.* (1898), 25 A.R. 437, followed. Judgment of TEETZEL, J., reversed.

ACTION for damages for personal injuries. The facts are stated in the judgment at the trial, which took place before TEETZEL, J., and a jury, at Toronto, on the 8th and 9th of February, 1905.

E. E. A. DuVernet, and *W. M. Boulton*, for the plaintiffs.

W. R. Riddell, K.C., for the defendants.

March 14. TEETZEL, J.:—The plaintiffs are husband and wife. On the 21st July, 1904, they were being driven in an enclosed omnibus from the wharf up Yonge street, in the city of Toronto, and when crossing the tracks which run along the Esplanade, the omnibus was caught between the two parts of a freight train of the defendants, which had been parted at Yonge street and which was about to be coupled, when the driver of the omnibus was caught between the two sections of the train, and while considerable damage was done to the omnibus, neither of the plaintiffs suffered visible bodily injury, beyond a few slight bruises, but both complained of serious injury to their nervous systems as a result of fright.

The following are the questions submitted to the jury and their answers:—

(1) Was the defendant through its employees guilty of negligence? A. Yes.

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(2) If yes, in what did such negligence consist? A. In not giving proper or sufficient warning that the cut or opening in the train was for the use of the general public.

(3) If you find the defendant was guilty of negligence did such negligence cause the injury to plaintiffs? A. Yes.

(4) Is the injury of which the plaintiff Christian Geiger complains wholly due to mental shock or is it attributable partly to mental shock and partly to shock caused by the blow? A. Mental shock only.

(5) At what sum do you assess the damages to the plaintiff Christian Geiger?

(a) In respect of personal injury resulting exclusively from mental shock? A. \$700.

(b) In respect of shock caused by blows? (No answer.)

(6) Is the injury of which the plaintiff Emma Marie Geiger complains wholly due to mental shock, or is it attributable partly to mental shock and partly to shock caused by a blow? A. Mental shock only.

(7) At what sum do you assess the damages to the plaintiff Emma Marie Geiger?

(a) In respect of personal injury resulting exclusively from mental shock? A. \$300.

(b) In respect of shock caused by blows? (No answer.)

The jury were not instructed as to any difference between nervous shock and mental shock, the words "nervous" and "mental" having been used throughout the trial as interchangeable epithets. Upon the evidence I think it would have been more correct to have used the expression "nervous shock" in the questions submitted; but, in dealing with the questions, I think it is manifest that the jury in assessing damages for mental shock and allowing no damages for shock caused by blows, had regard to the absence of any apparent physical injury caused by the collision, and that the damages were assessed for the loss of time, inability to work, sleeplessness, and other discomforts suffered by the plaintiffs as a consequence of the shock to their nervous systems, attributable to the fright at the time of the collision.

Mr. Riddell, relying upon the well-known and much criticised case of *Victorian Railways Commissioners v. Coultas*

(1888), 13 App. Cas. 222, which was followed in our Court of Appeal in *Henderson v. Canada Atlantic R.W. Co.* (1898), 25 A.R. 437, argued that upon the above findings the action should be dismissed.

In neither of the above cases was there any impact. In the first case cited, a gate-keeper of the railway company had negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so; and the jury, although an actual collision with the train was avoided, assessed damages for physical and mental injuries occasioned by the fright, and the questions reserved for the Privy Council were: (1) Whether the damages awarded by the jury to the plaintiffs are too remote to be recovered; (2) whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants; and the case was disposed of by the answer made to the first question. In closing their judgment, their Lordships remarked as follows (p. 226): "It is remarkable that no precedent has been cited of an action similar to the present having been maintained or even instituted, and their Lordships decline to establish such a precedent. They are of opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants."

In the *Henderson* case, there was also no impact. In that case, owing to the failure of the defendants to give the statutory warning or any equivalent warning, the plaintiff drove close to their line of railway and his horses were frightened by a passing engine and injury resulted; and while he was allowed damages for injury caused by blows and for injury to his horse and carriage, he was not allowed damages for mental shock on the authority of the *Victorian Railways* case.

In speaking of the *Victorian Railways* case, Mr. Justice Moss, at p. 444, said: "It was argued for the plaintiff that the decision of the Judicial Committee in the case of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, has not been generally accepted as an authority, and that this Court should not consider itself bound by it. Undoubtedly it has

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excited much comment, and in some tribunals which have felt themselves at liberty to disregard it, it has not been adopted. . . . Whatever weight may be or ought to be given to these views by other courts, it is now incumbent upon this Court to accept and follow that case as a decision of the ultimate court of appeal for this country."

The latest criticism of the *Victorian Railways* case is in *Dulieu v. White*, [1901] 2 K.B. 669, in which case, although there was no impact, the Court refused to follow the *Victorian Railways* case.

While judgments of the Judicial Committee of the Privy Council are binding upon colonial courts, they are not binding upon other courts in Great Britain or Ireland.

It seems to me that the principle relied upon by the defendants, as established by the above two cases, must be limited to cases where there has been no physical impact, and that this case is distinguishable by the fact that here there was physical impact through the negligence of the defendants, and the impact was under such conditions that it was reasonable and natural that the plaintiffs would suffer in consequence thereof great nervous or mental shock.

They were rightfully travelling on a highway in an enclosed vehicle, when, without warning, their vehicle was suddenly struck by a moving car of the defendants, pushed a short distance sideways, and impinged upon the end of another car. The unexpected collision, the crashing of the broken vehicle, and the imminent peril to the plaintiffs of being killed or seriously injured, were just such conditions as would naturally cause them to be seized with sudden terror.

Referring to questions 4 and 6, the injury of which the plaintiffs complained was injury to their physical health attributable directly to nervous or mental shock, which shock was directly attributable to the negligence of the defendants in colliding their car with the plaintiffs' vehicle, so that there is the sequence of impact causing nervous shock which in turn causes the injuries complained of; as put by Kennedy, J., in *Dulieu v. White*, *supra*, "natural and continuous sequence uninterruptedly connecting the breach of duty with the damage, as cause and effect."

I therefore think that the finding as to remoteness of this character of damage in the *Victorian Railways* case cannot be held to apply where there has been direct physical impact through the neglect of the defendant. The judgment in that case left entirely untouched the question of impact or what its effect would have been in determining the question of remoteness, and for that reason, as I have stated above, I think this case is distinguishable and not bound thereby, or by the *Henderson* case, in which the question of the effect of impact was also not considered; and finding no precedent where damages resulting from mental shock in cases where impact has been present have been disallowed, I decline to establish such a precedent in this case. In *Dulieu v. White*, at p. 684, Phillimore, J., says: "The gate-keeper in the *Victorian Railways* case was careless in opening the gate when the train was coming, and would have rendered his railway liable if there had been actual impact, even if the actual impact was produced by a wrong manœuvre taken under the influence of fear," citing *The Bywell Castle* (1879), 4 P.D. 219.

Judgment will therefore be for the male plaintiff for \$700 damages and for the female plaintiff for \$300 damages, together with their costs of action.

An appeal by the defendants from this judgment was argued before a Divisional Court [MEREDITH, C. J. C. P., ANGLIN, and CLUTE, JJ.] on the 18th of September, 1905.

W. R. Riddell, K.C., for the appellants. The findings of the jury are not sufficient to justify a judgment in favour of the plaintiffs. If, however, the second finding of the jury is taken as equivalent to a finding in the plaintiffs' favour then it should be set aside for there is nothing in the evidence to justify the conclusion that there was in fact negligence on the part of the defendants. There was no invitation to cross the line between the cars and the driver of the omnibus was clearly guilty of the grossest negligence in attempting to drive through the narrow opening. In addition to this there is uncontradicted evidence that a warning not to cross was given and disregarded. Assuming, however, that on all other points

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the liability is made out the plaintiffs must fail on the technical objection to the nature of the alleged damage. The case comes directly within *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222. The learned Judge in the court below has attempted to distinguish that case on the ground that there was no actual impact. That, however, is not the ground of the decision, which is that damages for mental or nervous shock cannot be allowed. The meaning of the *Coultas* case is very clearly pointed out in the decision in our own Court of Appeal of *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437. In that case there was physical injury as well as the nervous shock and the damages were assessed separately and as to the nervous shock were disallowed, the *Coultas* case being distinctly interpreted by the Court of Appeal as preventing any recovery on the latter head. The questions in the present case are based on those submitted to the jury in the *Henderson* case and it is impossible to distinguish the two cases on the facts so that the ruling in the *Henderson* case must, it is submitted, be followed. It is true that the *Coultas* case has not been followed in the later English decisions such as *Pugh v. London, Brighton and South Coast R.W. Co.*, [1896] 2 Q.B. 248; *Wilkinson v. Downton*, [1897] 2 Q.B. 57; and *Dulieu v. White*, [1901] 2 K.B. 669, but the decision of the Judicial Committee is binding on the courts of this Province and must be followed.

E. E. A. DuVernet, and *W. M. Boulton*, for the respondents. No precautions were taken by the defendants to protect persons using the highway and the finding of the jury, which reasonably read is a clear finding of negligence, should not be disturbed and is conclusive. The only difficulty in the case, if difficulty there be, is as to the proper effect to be given to the *Coultas* decision. It is submitted that on a careful reading of that case the decision that damages for nervous shock cannot be recovered must be limited to cases where there has been nothing but nervous shock and no impact or physical injury. Where there is impact no matter how slight the *Coultas* case does not apply; for in that case the purely mental result is being dealt with. Where there has been physical injury a general assessment of damages may be made and in fixing the

amount the jury are entitled to allow a fair compensation for the possibly very disastrous results of the shock to the nerves of the sufferer. The *Henderson* case is certainly not intended to carry the doctrine of the *Coultas* case any further and in it there was no direct impact between the train and the vehicle. The later authorities, both English and American, hold clearly that where there has been physical injury the doctrine of non-recovery of damages for mental shock does not apply. See for example 5 Columbia Law Review, p. 1; Sedgwick on Damages, 8th ed., sec. 861; Pollock on Torts, 6th ed., pp. 50, 52; Beven on Negligence, 2nd ed., pp. 76 to 83; 8 Am. & Eng. Encyc., 2nd ed., p. 666.

Riddell, in reply.

October 17. MEREDITH, C.J.:—It was argued on the part of the appellants that there was no evidence of negligence proper to be submitted to the jury and no finding of negligence which justified the entry of judgment in favour of the respondents, and it was contended that in any case judgment should have been entered for the appellants because of the finding of the jury that the injuries for which they awarded damages were the result of mental shock only.

It is unnecessary in the view I take as to the latter of these contentions to determine whether the other of them is entitled to prevail, though my impression upon the argument was and still is that reading the answer of the jury to the second question as I think it must be read, "In not giving proper or sufficient warning that the cut or opening in the train was not for the use of the general public," there was evidence to support that finding, and to entitle the respondents to judgment.

I am, however, of opinion that it is impossible to distinguish this case from *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437. In that case the jury found for the plaintiff and assessed his damages for his personal injuries under two heads, those for "personal injury resulting exclusively from mental shock" at \$600, and those "in respect of shock caused by blow or blows" at \$400, and it was held by the trial Judge and by the Court of Appeal that there could be no recovery for the

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\$600, because, as was said by the present Chief Justice of Ontario, "the evidence of the medical men as to the nature of the nervous shock and its effect upon the plaintiff brings this case fairly within the rule laid down by the Judicial Committee (*Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222), and we must treat the matter as concluded so far as we are concerned."

In that case (the *Henderson* case) the facts were that the plaintiff's horses had run away owing to fright caused by the negligence of the defendants, resulting in the plaintiff being thrown from his carriage and receiving in addition to the injuries which the jury found to be due exclusively to mental shock somewhat severe bruises and other physical injuries.

The case at bar is not, I think, so strong a case for the respondents because the jury have negatived the suffering of damages from the bruises which both of the respondents testified they had received in the collision, and as I have said confined the damages to the mental shock only.

I am unable to discover any satisfactory ground for distinguishing this case from the *Henderson* case. It was argued, and that appears to have been the view of my brother Teetzel, that the cases are distinguishable because in this case the respondents' injuries were the result of actual impact between the appellants' train of cars and the vehicle in which they were being driven, while in the *Henderson* case there was no such impact.

I am unable to adopt this view. The case in the Privy Council was not, as I understand the report of it, decided upon the ground that there was no impact but upon the broad ground that "damages arising from mere sudden terror unaccompanied by any actual physical injury but occasioning a nervous or mental shock" (page 225) were too remote and could not be recovered, and that too although there was evidence that the fright and consequent shock had caused the illness for which the jury had awarded damages.

It may be that the decision of the Court of Appeal goes further than the *Coultas* case, and that inasmuch as the terror of the plaintiff in the *Henderson* case was accompanied by physical injury damages for the injury occasioned by the

accompanying mental or nervous shock might have been allowed without departing from the principle of the decision in the *Coultas* case, but however that may be, we are in this Court bound to follow the *Henderson* case and following it to hold that the respondents were not entitled to judgment.

In addition to the cases cited by my brother Teetzel, I may refer to *Sloane v. Southern California R.W. Co.* (1896), 111 Cal. 668; *Purcell v. St. Paul City R.W. Co.* (1892), 48 Minn. 134, followed by the Supreme Court of South Carolina in *Mack v. South Bound R.W. Co.* (1898), 40 L.R.A. 679, as supporting the conclusion to which my brother Teetzel came, and as affording cogent reasons for doubting (if one were permitted to doubt) the correctness of the decision in the *Coultas* case.

The appeal must, therefore, be allowed and the judgment in favour of the respondents reversed, and in lieu of it judgment be entered dismissing their action, but in view of the unsatisfactory state of the law and the conflict in the decisions, there should be no costs of the action or of the appeal.

ANGLIN, J.:—With very great respect for the opinion of the learned trial Judge, I find myself unable to distinguish this case from *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437, and in my view the decision of the Court of Appeal for Ontario upon the plaintiff's cross-appeal in that case is conclusive against the present plaintiffs.

The jury have found that the injuries of which the plaintiffs complain were due wholly to mental shock and not at all to shock caused by a blow. Against these findings the plaintiffs have not moved.

In the *Henderson* case the jury found that the injuries sustained by the plaintiff were attributable partly to mental shock and partly to shock caused by a blow. The plaintiff's verdict in respect of the latter injuries was sustained, while against the refusal of the trial Judge to enter judgment in his favour for the damages assessed in respect of the injuries due to mental shock he appealed in vain.

The course pursued in asking the jury to distinguish between "injuries wholly due to mental shock and those attri-

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butable partly to mental shock and partly to shock caused by a blow," is by implication approved of by the Court of Appeal. The question put to the jury in the present case by the learned trial Judge is in the very words which were used in *Henderson v. Canada Atlantic R. W. Co.* I find nothing in the answers of the juries to distinguish the one from the other.

The learned trial Judge read the words "mental shock" as meaning "nervous shock" and he distinguished this case from *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, and *Henderson v. Canada Atlantic R. W. Co.* 25 A.R. 437, because here there was actual impact of the defendants' train with the conveyance in which the plaintiffs were carried.

I am unable to so distinguish between this case and *Henderson v. Canada Atlantic R. W. Co.* The Court of Appeal alludes to the difference between "mental shock in the sense of an emotion of the intellectual feelings and nervous shock as expressing a physical disorder of the nervous system." Both are held to be within the purview of the decision of the Judicial Committee in *Victorian Railways Commissioners v. Coultas*.

The finding of the jury has, as I understand it, expressly negatived all connection between the injurious shock suffered by the present plaintiffs and any blow or blows. I am therefore at a loss to understand how the fact that there was in this case direct impact between the defendants' train and the omnibus carrying the plaintiffs can be said to distinguish this case from *Henderson v. Canada Atlantic R. W. Co.*, where, without such direct impact, the plaintiff was through the rearing of his horses caused by fright thrown from his carriage with the result that he suffered certain injuries attributable only to mental shock, for which it was held that he could not recover.

The law upon this question is in a most unsatisfactory state, and, if free to do so, I would much prefer to follow the late English authorities cited in argument. But the decision in *Victorian Railways Commissioners v. Coultas*, as interpreted in *Henderson v. Canada Atlantic R. W. Co.* precludes this Court, in my opinion, from upholding the judgment in appeal.

CLUTE, J.:—It is with great diffidence that I dissent from the judgment of the majority of this Court.

I do not think that *Henderson v. Canada Atlantic R.W. Co.*, 25 A.R. 437, was intended to extend the application of the law as enunciated in *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222; and I am of the opinion that the present case does not fall within the principle laid down in the *Coultas* case. In that case the statement of claim stated that through the negligence of the servant of the defendants in charge of the railway gate at the level crossing the plaintiffs while driving over the level crossing were placed in imminent peril of being killed by the train, and by reason of the premises the plaintiff Mary Coultas received a severe shock and suffered personal injuries, etc. The defendants denied the allegations in the statement of claim and contended that no cause of action was disclosed by it, as it was not stated that either the plaintiff or her property was struck or touched by the train of the defendants, and, further, that the alleged damage arising from the shock or fright, without impact, was too remote to sustain the action,

The facts proved at the trial are stated at page 224 of the appeal case, and it there appears that the buggy in which the plaintiff was riding got across the line of railway, so that the train, which was going at a very rapid speed, passed close to the back of it and did not touch it. As the train approached Mary Coultas fainted and fell forward in her brother's arms. The medical evidence shewed that she received a severe nervous shock from the fright and that the illness from which she afterwards suffered was in consequence of the fright. The jury found that the defendants' servant negligently opened the gate and invited the plaintiffs to drive over the level crossing when it was dangerous to do so, and that the plaintiffs could not have avoided what had occurred by the exercise of ordinary care and caution on their part; and they assessed the male plaintiff's damages at £342 2s., and the female plaintiff's at £400, leave being granted to either side to move for judgment after the full Court had decided the points reserved. The points reserved were:

1. Whether the damages awarded to the plaintiffs or either of them, are too remote to be recovered?

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2. Whether proof of "impact" is necessary in order to entitle the plaintiffs to maintain the action?

3. Whether the female plaintiff can recover damages for physical or mental injuries, or both, occasioned by fright caused by the negligent acts of the defendants?

On the argument before the Privy Council these points were adhered to, and it was contended for the railway that the damages claimed were too remote; and that "*damages could not be recovered for mental injuries caused by negligent acts of the appellants where there was an absence of all physical damage caused by the appellants' negligence.*" The liability is for the ordinary and immediate consequence of negligence. A mere nervous shock caused by fright of the impending event which never happens, results from the constitution and circumstances of the individual, and does not give a cause of action, to support which there must be physical injury directly resulting from the negligent act or omission."

For the respondent it was contended "that proof of 'impact' was not necessary to support the action. The negligent acts of the defendants necessarily caused great fright at the serious imminence of a collision. Both physical and mental injuries resulted and the jury were right in awarding damages therefor."

The judgment, I think, proceeds strictly on the line of the points reserved and the case was disposed of expressly upon the opinion that the first question, whether the damages are too remote, should have been answered in the affirmative, "and on that ground, without saying that 'impact' is necessary, that the judgment should have been for the defendants." This, I think, does not mean that where there is "impact" resulting in nervous shock causing physical injury the plaintiff cannot recover, but, on the contrary, that even in certain cases where there is no "impact" it may be possible for the plaintiff to recover; in other words, that this case does not decide that where there is "impact," which results in nervous shock, causing physical injury from such nervous shock, and due exclusively to that nervous shock, the plaintiff cannot recover. This is made clear from another part of the judgment, where it is said: "According to the evidence of the female plaintiff, her fright

was caused by seeing the train approaching and thinking that they were going to be killed. *Damages arising from mere sudden terror unaccompanied by any actual physical injury*, but occasioning a nervous or mental shock, cannot, under the circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

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Suppose instead of fright caused by seeing the train approaching there had in fact been an actual collision which caused a slight outward injury and mental shock causing serious physical injury. Can it be said in that case that the decision goes the length of holding that the plaintiff could not recover? As I read the case their Lordships guard against such a view of the law. Here what occurred is stated by a witness, Cheeseman, the hotel porter, at page five of the evidence: "Then what occurred? When I started to go through, the west end of the train commenced to back up, I then tried to whip up the horses to get through, and before I could get through the train caught me. That was the east side remained stationary? Yes, sir. But the west part of the train backed up on you? Backed right on me. And the result was you got caught? Yes, it knocked my 'bus on to the eastern part, and I was right in between the two. What occurred then? They stopped the train and drew the front part up again. Was the 'bus knocked over? No, it could not be knocked over because the eastern part of the train was keeping it up; I was driven on to the other part of the train; I was forced back on to it. You were forced back on to the easterly part of the train? Yes. What happened to the 'bus? The wheels were broken and the sides were pushed in, the windows were broken and severely damaged. What sort of a crash was it? The wheels were buckled up underneath it. It was the old-fashioned 'bus with very strong axles which prevented it being forced right through; it happened to catch both wheels and the axles prevented the whole 'bus going over, being a very strong axle."

The effect of this collision upon the plaintiffs is stated by Geiger at page 46: "What occurred? We took the King Edward Hotel 'bus at the wharf, and gave the driver instructions to take us to the hotel. And then what occurred? As we struck the railway crossing the 'bus man stopped and I

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turned around and looked to see what was the trouble, and I saw a freight train moving west. . . . What happened to the 'bus when the train came down? I saw the train coming so I moved my wife towards the driver's seat and stood up in front of her and raised my hand over her head, thinking the 'bus would split, and we probably could drop out or do something that way, because we sat right in the middle of the 'bus when the 'bus was struck, and I moved her as I saw the freight car coming in on us, moved her up towards the driver, the front of the 'bus, and stood up in front of her and had my arm against the upper end of the 'bus like that. What occurred? The 'bus was struck. Describe it, please? The 'bus was struck and my wife heard the noise and she wanted to know what is that, and she saw the freight train on the top of us and she wanted to get out. I still had her up in that corner, of course I moved her towards the door."

The injuries which the plaintiff received are given at page 50, and although not very serious in themselves, the witness states that the effect of the shock was rather serious.

The female plaintiff states at page 76, line 17: "I remember that the one end of the car struck the 'bus and beyond that I do not remember excepting that I fell out of the 'bus on my knees." At page 79 she described the bruises which she found upon her hip and arm and wrist and elbow and both knees. She says that these bruises were black and blue and lasted for two weeks, and she further describes her subsequent illness which she attributed to the effect of the collision.

It is not clear what the jury meant in their answer to the second question, but I agree with the Chief Justice that the answer may be read as he suggests. Assuming this to be so, does the present case fall within the principle decided in the Privy Council in the *Coultas* case? The decision in that case was distinctly limited to the answer to the first question, namely, as to whether the damages were too remote, and their Lordships say that it is remarkable that no precedent has been cited of a similar action having been maintained or even instituted, and their Lordships decline to establish such a precedent, and they find that the damages in that case were too remote; that is, "that damages arising from mere sudden terror unaccompanied by any physical injury, but occasioning a

nervous or mental shock, cannot under the circumstances be considered a consequence, which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

As in the *Coultas* case, so in *Henderson v. Canada Atlantic R. W. Co.*, there was no collision between the train and the plaintiff's conveyance. The damages in the *Henderson* case could have no relation to mental shock caused from the actual blow or impact from the defendant company, because there was no collision. The cases to my mind are perfectly distinct and it would be extending the application of the *Coultas* case much beyond its intendment if it were made to apply in the present case.

There may be some difficulty in sustaining the judgment for the plaintiff having regard to the form of the answer to question 2, which if not permissible to be stated as above indicated is unintelligible; and there is a further difficulty, that there is no answer to questions 5 (b) and 7 (b). This, to me, would rather indicate that the jury did not give sufficient attention to the distinction indicated between questions 5 (a) and 5 (b) and 7 (a) and 7 (b). But in both cases it will be observed they were only asked for damages in respect of: (a) from mental shock; and (b) in respect of shock caused by blows. No question was asked as to damages caused by blows, which although perhaps not very severe, were quite appreciable and sufficient to be assessable.

The distinction which I make between the cases is that where, as in the present case, the physical injury is the result of a direct blow or collision, owing to the defendants' negligence, there the plaintiff is entitled to have general damages assessed for such injury, and it is a refinement which, I think, few juries should be asked to attempt, to divide the damages by saying that so much are due to mental shock and so much for the other physical injuries. I do not myself see how in such a case it would be possible for the jury to say whether the shock resulting in physical injury was caused by fear, or was the natural and immediate result of the impact, resulting from the collision. I think the answer to question 2 may be read in the way suggested, and in that view the appeal should be dismissed with costs, otherwise there should be a new trial, with a direction that damages should be assessed generally.

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[IN THE COURT OF APPEAL]

C. A.

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June 29.

McINTOSH V. FIRSTBROOK BOX CO.

Master and Servant—Injury to Servant—Employment of Child in Factory—Misrepresentation as to Age—Dangerous Machinery—Warning—Negligence—Jury—New Trial.

The Court, OSLER, J.A., *dubitante*, affirmed the judgment of a Divisional Court, 8 O.L.R. 419, setting aside a nonsuit and directing a new trial of an action for damages for injuries received by the infant plaintiff while employed by the defendants in their factory, he being only ten years of age, but having wilfully misrepresented his age as fourteen when seeking the employment. There was some evidence that sufficient warning had not been given by the defendants to the plaintiff of the dangerous nature of the machines in the room in which he was at work, although not employed at them.

APPEAL by the defendants from the judgment of a Divisional Court, 8 O.L.R. 419, reversing the judgment of Teetzal, J., which dismissed the action, and directing a new trial.

The action was brought by an infant and his mother against the defendants for damages for injuries sustained by the infant by reason of the alleged negligence of the defendants and for the illegal employment of the infant in the defendants' factory, he being under fourteen years of age, and by the mother for expenses and loss of service of the infant.

The facts are stated in the former report.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, J.J.A., on the 15th May, 1905.

G. F. Shepley, K.C., and R. H. Greer, for the defendants, appellants.

J. Bicknell, K.C., and J. W. Bain, for the plaintiffs, respondents.

The arguments and authorities are sufficiently stated in the former report.

June 29. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court directing a new trial, Meredith, J., dissenting, reversing the judgment at the trial of Teetzal, J., in favour of the defendants.

The case is now reported in 8 O. L. R. 419, where the facts sufficiently appear.

I think the appeal fails, for the reasons given in the judgment of the learned Chancellor, to which I can profitably add but little.

It is, doubtless, the law that an infant shall not profit by his own fraud, as contended by the defendants, but they by no means established the fraud by merely proving that the plaintiff was only ten instead of fourteen years old as represented.

The defendants' foreman saw the boy when he hired him, and the jury saw him in the witness box, and it was for them to say whether, under all the circumstances, the defendants were in fact deceived.

And, even assuming the deception to have been established—that in fact the plaintiff is estopped from saying that his representation was not true—he would still, at the age of fourteen, be of tender years. He might, by such an assumption, lose the benefit of the provisions in his favour of the Factories Act, but this would not deprive him of his right to complain that his master had injured him by a breach of his duty arising out of the relationship of master and servant otherwise than under that Act, or even under that Act apart from the question of age.

And there was some evidence that the master here had not discharged his whole duty to a new boy of even the assumed age, for, while he was not at work at a dangerous machine, there were such machines in the room where he was employed, and he was not warned about approaching them, or to use only the safe way in going to and coming from his work. He saw others use the so-called passage or way which he was using when injured, and, as it was a short cut, may not unreasonably have thought that it might be safely used by him also.

This duty to warn, in the case of young employees, is very clearly laid down in more than one case. See *Robinson v. Smith* (1901), 17 Times L. R. 235, 423, and *Crocker v. Banks* (1888), 4 Times L. R. 324, both in the Court of Appeal.

The appeal should, in my opinion, be dismissed with costs.

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MOSS, C.J.O., MACLENNAN and MACLAREN, JJ.A., concurred.

OSLER, J.A. :—It is not without some doubt and hesitation that I concur in affirming the judgment. The judgment of the trial Judge, Teetzel, J., and of Meredith, J., in the Divisional Court, rather commend themselves as the satisfactory disposition of a case in which the plaintiff, though a small boy, shews that he had eaten of the tree of the knowledge of good and evil, and, according to his own account, had procured the defendants to employ him by means of a deliberate falsehood as to his age, and in which the accident he met with seems to have happened from his being in a place where he had no business to be.

As, however, the judgment below only directs a new trial, on which all questions as to liability will be open, and there is plausibility in the suggestion that the defendants have not shewn that they scrutinized with sufficient care the boy's statement of his age, I will not give expression to a dissent which, in the circumstances, must be useless.

T. T. R.

[IN THE COURT OF APPEAL.]

O'CONNOR V. CITY OF HAMILTON.

C. A.

1905

June 29.

Way—Non-repair—Negligence of Municipal Corporation—Notice of Accident—Reasonable Excuse for Want of.

While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling, or partly falling, into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe which had been laid some 12 or 14 feet below the surface of the ground about 20 years before and which for 18 years had given no indications of being out of repair. In an action to recover damages for the injuries, the negligence alleged was, that the street was at this time, and for a long time previous had been, out of repair and dangerous for travel, to the knowledge of the defendants; that the bed of the street was of quicksand; and that the sewer pipe had been improperly and negligently laid therein:—

Held, upon the evidence, reversing the judgment of a Divisional Court, 8 O.L.R. 391, that there was not sufficient evidence of the existence of surface indications of danger below, which the defendants could be charged with negligence in not having attended to before the day of the accident; and that, in the circumstances, negligence could not be imputed to the defendants either in the original construction of the sewer or the absence of subsequent examination and inspection.

Semble, as regards the question whether there was reasonable excuse for omission to give the statutory notice of the accident under sec. 606 of the Municipal Act, 3 Edw. VII. ch. 19 (O.), that what may constitute reasonable excuse is not defined and must depend very much upon the circumstances of the particular case. Where there is actual knowledge or verbal notice, it may be regarded as an element of the excuse, but something more is required. The fact of the accident, by itself, is not a reasonable excuse, if it is not accompanied by some disabling circumstance. The plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance of the law.

Armstrong v. Canada Atlantic R. W. Co. (1902), 4 O.L.R. 560, referred to.

APPEAL by the defendants from the judgment of a Divisional Court, 8 O.L.R. 391, in favour of the plaintiff in an action to recover damages for injuries sustained by the plaintiff owing to the alleged non-repair of a street in Hamilton. The facts are stated in the former report and in the judgment of OSLER, J.A., *infra*.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 23rd February, 1905.

F. MacKelcan, K.C., for the appellants. There would be no right of action for damages sustained by non-repair of a highway if it were not for the statute: *Municipality of Pictou v. Geldert*, [1893] A.C. 324. The statute is sub-sec. 1 of sec. 606

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of the Consolidated Municipal Act, 1903; and sub.-sec. 3 qualifies the right of action by making notice in writing of the accident necessary. Proof of an oral notice will not avail: *Moyle v. Jenkins* (1881), 8 Q.B.D. 116; *Keen v. Millwall Dock Co.* (1882), *ib.* 482; nor will a notice to a subordinate officer suffice. The knowledge of the superintendent of the street watering teams, who had nothing to do with the settlement of claims, cannot be sufficient to excuse the failure to give written notice to the mayor or clerk. There is no reasonable excuse here for not giving notice, mere ignorance not being an excuse: *Armstrong v. Canada Atlantic R.W.Co.* (1901-2), 2 O.L.R. 219, 222, 4 O.L.R. 560, 568; *Biggart v. Town of Clinton* (1903-4), 2 O.W.R. 1092, 3 O.W.R. 625. Actual knowledge does not dispense with the necessity for giving a written notice: *In re McCrae and Village of Brussels* (1904), 7 O.L.R. 146, 8 O.L.R. 156. The place where the accident happened is not near the centre of the city, and there is no reason for supposing that the occurrence was notorious. The Chancellor is mistaken in this. But even if the accident had happened in a much-frequented part of the city and had become notorious, that would be no excuse for not giving the notice. The decision of the trial Judge that no reasonable excuse was shewn is final, and the Court below had no power to reverse it. The onus was on the plaintiff to prove facts which excused the want of notice, and he proved nothing. He was not so injured as to be incapable of having a written notice sent to the mayor or clerk. If the want of notice is excused, however, the plaintiff must still fail. There was no direct finding of negligence by the trial Judge, and the majority of the Divisional Court have not dealt with the question, but assumed that there was a finding. If there was such a finding, it could not be supported. No negligence in the construction of the sewer is shewn. The evidence as to surface indications does not bear out the inference that something was wrong below. If there was notice, from the appearance of the roadway, of its defective condition, the plaintiff was guilty of contributory negligence in not notifying the authorities. Reference to and discussion of the following cases on negligence: *Smith v. West Derby Local Board* (1878), 3 C.P.D. 423; *Gray v. Pullen* (1864), 5 B. & S. 969, 985; *Borough of Bathurst v. Macpherson*

(1879), 4 App. Cas. 256; *Lambert v. Corporation of Lowestoft*, [1901] 1 K.B. 590; *Minns v. Village of Omemee* (1901-2), 2 O.L.R. 579, 8 O.L.R. 508; *Garfield v. City of Toronto* (1895), 22 A.R. 128, 130; *Noble v. City of Toronto* (1882), 46 U.C.R. 519, 530; *Duck v. City of Toronto* (1884), 5 O.R. 295, 300; *Ridgway v. City of Toronto* (1878), 28 C.P. 579. If the judgment is upheld, the damages should be reduced.

William Bell, for the plaintiff. There is a right of appeal from the finding as to reasonable excuse: *Armstrong v. Canada Atlantic R.W.Co.*, 4 O.L.R. 219; *City of Kingston v. Drennan* (1897), 27 S.C.R. 46; *Cavanagh v. Park* (1896), 23 A.R. 715. The object of the requirement of notice is to give the municipal authorities an opportunity of getting evidence of the facts: *City of Kingston v. Drennan*, *supra*; *Biggart v. Town of Clinton*, 2 O.W.R. 1092. The trial Judge found as facts that the defendants were not prejudiced in their defence by want of notice and that they knew of the happening of the accident immediately after it took place, and these findings are supported by the evidence and should not be reversed. The defendants at once proceeded to repair the street, and thus got all the evidence they required as to the cause of the accident. The notice of the injury was only four days late, and the evidence shews that the plaintiff was so injured that he was not able to attend to business matters for more than seven days. The notice to the superintendent was a reasonable excuse for the four days' delay in giving the formal notice. The trial Judge was against the defendants on the merits, or he would not have assessed the damages. The evidence shews that the sewer construction was faulty, and that there were strong indications on the surface of a cave-in for some time before the injury to the plaintiff. The sewer was laid on a bed of quicksand, and clay instead of cement was used for jointing, the result being that water ran through the joints and caused the cave-in. The defendants had knowledge of this. The negligence is clear. Reference to cases discussed in the argument of the appellants' counsel and referred to in the judgment.

MacKelcan, in reply.

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June 29. The judgment of the Court was delivered by OSLER, J.A.:—This was an accident to recover damages for injuries sustained by the plaintiff for the neglect of the defendants to keep in repair a certain street called Hess street, within the municipality. The accident happened on the 11th September, 1903.

The case was, that while the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling, or partly falling, into the hole thus caused, the plaintiff was thrown out and his arm was broken and he was otherwise injured. The break in the street was caused by the falling in of a sewer pipe which had been laid some 12 or 14 feet below the surface of the ground.

The negligence alleged was that the street was at this time and for a long time previous had been out of repair and dangerous for travel to the knowledge of the defendants; that the bed of the street was of quicksand; and that the sewer pipe had been improperly and negligently laid therein.

The defence was a denial of the alleged negligence, and an allegation that the plaintiff had not given notice in writing of the accident and the cause thereof within seven days thereafter, as required by sec. 606, sub.-sec. (3), of the Municipal Act.

It appeared that notice in writing was given to the proper officials eleven days after the accident, but Meredith, C.J., who tried the case without a jury, held that no reasonable excuse had been proved within the proviso of sec. 606 for not having given it within the prescribed time, though he was also of opinion that the defendants had not thereby been prejudiced in their defence. He thought that there was some evidence of negligence, though he made no express finding on that point, and assessed the damage contingently at \$400, but dismissed the action on the ground of the omission to give the required statutory notice. A Divisional Court, by a majority, reversed this judgment, holding that, under the circumstances, there was reasonable excuse for the omission to give the notice. Without discussing the question of negligence, they seem to have accepted the view of the trial Judge and directed judgment for the plaintiff for the damages assessed by him. Meredith, J., dissented, being of opinion that there was neither evidence of

negligence nor of reasonable excuse for not giving notice of the accident.

From this judgment the defendants appeal.

After a careful examination of the evidence, I find myself, with all due deference, unable to concur with the Divisional Court in holding that actionable negligence was proved.

The negligence relied on by the plaintiff was two-fold, consisting in the first place of the disregard of alleged indications on the surface of the street suggestive of mischief going on beneath it, such as a possible weakness or break in the sewer pipe; and secondly, in the original faulty method of laying the sewer pipe in quicksand without taking proper precautions against the disintegration of the joints. Liability in respect of the former would exist only if there were such indications in fact and the defendants knew of them, or they had been present for so long a time that they were notorious and therefore the defendants ought to be taken to have known of them. As to this ground of negligence the only evidence was the following. The plaintiff said that in the course of his duty of driving the watering cart he had passed along the street four times a day from the 28th May until the day of the accident and had not observed anything wrong with the street or insecurity in the surface, except that at one place there was a rut of about five yards in length. At the place where the accident happened the road was perfectly good and smooth, and so far as he knew a safe road on the outside.

Carroll said that before the accident (he does not say how long before it) he noticed a low place in the middle of the street, at say about the place in question: a black streak there, he could not say exactly what it was, a different colour from the rest of the road.

Crossman on the morning of the accident, when crossing the street, noticed a little swelling, and on the left hand a little crack, just that you could notice it. About 20 feet beyond that had seen just a sinkage like from a wheel; had noticed that quite a while, some weeks.

McAllister a day or two before the accident observed a kind of place (the place where the accident happened); you would

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think it rubber, a soft place; just the wheel going down and coming up again.

Weaver, a street repairer in the defendants' employment, was over the road, not every day perhaps, but every week. Had seen nothing wrong with it, would certainly have seen it if there had been. Saw no indication of sinking. Was always looking for anything he could see that was wrong. Saw no hole nor sign of one.

Of this evidence Crossman's is that which at all comes near to affecting the defendants, but it does not appear that the sinkage he speaks of, about twenty feet from the place in question, was in any way connected with or caused by the defect in the sewer, or was anything more than an ordinary surface rut not calling for exploration of hidden causes or any other remedy than filling it up. On the whole it appears to me that there was no sufficient evidence of the existence of surface indications of danger below, which the defendants can be charged with negligence in not having attended to before the day of the accident.

Then, as regards negligence in the original construction, and, it may be added, in the omission to inspect and examine the sewer. It appeared that the sewer pipe had been laid twenty or twenty-one years before the occurrence of the accident. That about two years after it had been laid a break occurred in the pipe, followed by a similar break in the street perhaps one hundred feet or a little less from the place now in question. At this part of the street there was some underlying quicksand, and in constructing the sewer through it the difficulty which it might cause in displacing the level of the pipe was overcome by laying plank beneath and on each side of it. What caused the first break or the later one was not clearly shewn. It did not appear that the plank had decayed, but it was suggested that the breaks were due to the action of the water on quicksand wasting away the clay in which the joints of the pipes had been laid, and thus causing them to open, and it was said that the jointing should have been done with cement or packed with jute according to the more modern practice. But the evidence is that the pipe was carefully laid in the manner and with the material then usually adopted and used, and believed to be

efficient, and for some 18 years before the accident no further weakness or break in it had been manifested either by the falling in of the ground above it or by its failure to serve the purpose for which it was constructed. There was no evidence that the pipe could have been inspected and its condition from time to time discovered by any means short of actually taking up the street, and indeed the absence of evidence of any obstruction in it or of its having ceased to be in a working condition previous to the accident strongly indicates that the defect was one of the most recent occurrence, and that an examination and inspection of the most costly and unusual kind would probably have disclosed nothing wrong with it. Under these circumstances I am of opinion that negligence cannot justly be imputed to the defendants either in the original construction of the sewer or the absence of subsequent examination and inspection.

I do not think that cases like *Smith v. West Derby Local Board*, 3 C.P.D. 423, and *Gray v. Pullen*, 5 B. & S. 969, *Duck v. City of Toronto*, 5 O.R. 295, and *Ridgway v. City of Toronto*, 28 C.P. 579, are of any assistance. The evidence of negligence in these cases was that the trench over the sewer constructed recently before the occurrence of an accident had been carelessly filled in and the earth not properly consolidated so as to prevent settlement from rain or other causes.

Borough of Bathurst v. Macpherson, 4 App. Cas. 256, is also a very different case from the present. It discloses a simple case of actionable negligence. The defendants had constructed a drain in the public highway which in the course of time caused a dangerous hole in the street. They neglected for some two years either to repair the drain or to protect the public against the danger by filling up the hole or fencing it, and the plaintiff fell into it and was injured.

The case of *Lambert v. Corporation of Lowestoft*, [1901] 1 K.B. 590, is in many respects like the case at bar, and favours the conclusion I have arrived at that the defendants were not negligent.

See also Jones on Negligence of Municipal Corporations (1892), secs. 156, 157, and notes.

As regards the question whether there was reasonable excuse

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for omission to give the statutory notice, I repeat what I said in *Armstrong v. Canada Atlantic R.W.Co.*, 4 O.L.R. 560, when dealing with a somewhat similar question arising under the Workmen's Compensation Act, namely, that what may constitute reasonable excuse for not giving notice is not defined and must depend very much upon the circumstances of the particular case. It is not easy, therefore, to lay down any general principle for determining what is reasonable excuse. A verbal notice would be an insufficient notice. Some reasonable excuse would still be required for not having given notice in writing. Hence mere knowledge by the employer of the accident, from any source, is, standing alone, not enough to excuse the want of such notice. When there is actual knowledge or verbal notice (though this serves mainly to shew that the defendants have not been prejudiced in their defence by the lack of written notice), it may be regarded as an element of the excuse, but something more is required, whether personal to the individual injured or to the employer, or to both. Nor is the fact of the accident by itself a reasonable excuse for not giving notice if it is not accompanied by some disabling circumstance, mental or physical. In the present case it is enough to say that the plaintiff was not misled by any one into not giving notice and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act.

I have not thought it necessary to refer to the provisions of the Workmen's Compensation Act which were considered in *Armstrong v. Canada Atlantic R.W.Co.*, 4 O.L.R. 560. They probably admit of a more elastic administration than does the section of the Municipal Act. I may say, however, that I do not think I expressed myself there as holding that notice of a claim by the workman was required by sec. 9 of the Workmen's Compensation Act. I referred to the fact that notice of the claim had been given as being something in support of the contention that reasonable excuse was made out.

The subject is discussed in sec. 711, vol. 2, of Mr. Labatt's valuable work on "Master and Servant."

The appeal should, in my opinion, be allowed.

T. T. R.

[IN CHAMBERS.]

TATTERSALL V. PEOPLE'S LIFE INSURANCE CO.

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July 4.

Costs—Taxation—Witness Fees—Plaintiff Travelling from Abroad—Expenses—Subsistence Money—Plaintiff Remaining after Trial.

Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf at the trial of the action and in returning to England, and a *per diem* allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario awaiting the result of an application for a new trial in order to be in readiness to testify if one should have been directed,

AN appeal by the defendants from the taxation by the deputy clerk of the Crown at Hamilton of the plaintiff's costs of the action, in respect of the allowance of the plaintiff's travelling expenses from England to Toronto to attend the trial for the purpose of giving evidence on her own behalf and in returning to England, and of the further allowance to her of subsistence money at the rate of \$1.25 from the 24th September, 1904, to the 9th April, 1905.

The appeal was heard by MEREDITH, C.J.C.P., in Chambers, on the 28th April, 1905.

J. J. Warren, for the defendants.

C. W. Bell, for the plaintiff.

July 4. MEREDITH, C.J.:—When the action was begun the plaintiff resided at Toronto, and that is stated in the indorsement on the writ to be her place of residence.

After issue had been joined, the plaintiff went to England on a visit, intending to return in time to give her evidence when the case should come on for trial at the following autumn assizes.

When the plaintiff left for England, negotiations for a settlement were pending, and she was under the belief that these negotiations would result in a settlement being effected.

While in England, arrangements were made by her husband's relatives to provide for her there. She was without means, and

Meredith, C.J. these arrangements necessitated her taking up her residence in England, which she did.

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She returned to Canada in time for the trial, which took place on the 20th October, 1904.

The plaintiff was called as a witness on her own behalf, and it is admitted that she was a necessary witness, and that the case is not one in which she should have obtained a commission to take her testimony in England.

The plaintiff succeeded at the trial, but the defendants were dissatisfied with the result of it and appealed to a Divisional Court.

The notice of appeal was served on the 16th November, 1904; the appeal was heard on the 13th and 19th January, 1905; and judgment was given on the 17th February, 1905, dismissing the appeal with costs.

Acting upon the advice of her solicitor, the plaintiff did not return to England at once after the trial, but remained so as to be here to give evidence at the new trial, in case a new trial should have been ordered by the Divisional Court.

On the taxation of costs, the plaintiff has had taxed and allowed to her the expenses of coming from England to attend the trial and of returning to England and subsistence money at the rate of \$1.25 per day, reckoned from the 24th September, 1904, to the 9th April, 1905.

The costs were taxed on the 11th April, 1905.

The plaintiff has not yet returned to England, but remains in Canada, and she intends to return forthwith to England.

An appeal by the defendants from the judgment of the Divisional Court to the Court of Appeal is pending.

After the argument of the appeal, I asked the senior taxing officer at Toronto for a report as to the practice which prevails in his office as to making such allowances as are in question, and his opinion as to the propriety of their having been made on the facts of this case.

The senior taxing officer has reported against the allowance of both items, for reasons which fully appear in his report.

I agree with the opinion of the senior taxing officer as to the allowance of subsistence money to the plaintiff during her stay in Toronto after the trial.

In the case upon which the local officer proceeded in making the allowance (*Dowdell v. Australian Royal Mail Co.* (1854), 3 E. & B. 902), where the question arose as in this case on appeal from the taxation of the plaintiff's costs, the Court reached the conclusion that the allowance was properly made "after much hesitation and great doubt" (p. 905), and Lord Campbell, in delivering the judgment of the Court, said: "We are anxious that it should be understood that we lay down no general rule that, after a rule *nisi* for a new trial has been obtained, the witnesses may be detained at the cost of the losing party:" p. 905. The special circumstances which the Court thought justified the allowance "as part of the costs of the rule for a new trial" were that the plaintiff, who was a seafaring man, by reason of his calling could not possibly be ready to give evidence on the second trial if one had been ordered unless he remained in England, and that his remaining in England "deprived him of his ordinary means of earning subsistence by going abroad, and that he could not earn anything" in England.

No such circumstances nor anything like them exist in this case, and I see no reason why the losing party should be burdened with the expense of the plaintiff remaining in this Province after the trial, upon the chance of a new trial being ordered, and her presence at the second trial being necessary. There would have been no difficulty in her returning to Toronto in time for the new trial, if one had been ordered, and there was in her case no loss of her ordinary means of livelihood owing to her remaining to wait the new trial in case another trial should have been directed.

Under the circumstances of this case, the allowance of the travelling expenses of the plaintiff in coming from England to give evidence on her own behalf and of returning to England, and the *per diem* allowance for the time necessarily occupied in doing so, were in my opinion properly allowed.

The appeal will be allowed except as to the last mentioned allowance, without costs.

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June 8.

RE FARLEY.

Life Insurance—Beneficiaries, designation of—Legal heirs—Preferred beneficiaries—Children—Death of beneficiary—Further designation—R.S.O. 1897, ch. 203, sec. 159, sub-sec. 1.

By a beneficiary certificate issued in 1901, a benevolent society agreed to pay \$2,000 to the beneficiary or beneficiaries designated therein, with a reservation of powers of revocation and substitution. The beneficiaries were designated by an endorsement whereby payment was to be made to three named persons, "executors in trust for legal heirs," the insured having at this time a son and grandson living. In 1902, after the death of the son, the insured by a declaration in writing directed the moneys to be paid to a daughter-in-law and by his will he also so assumed to dispose of the moneys. The insured died in 1904, leaving him surviving his grandson and several brothers and sisters. On a claim made by the grandson as the legal heir:—*Held*, that by the use of the words "legal heirs" an irrevocable declaration was not created in favour of the persons who would answer that description on the death of the insured as preferred beneficiaries under sec. 159 of the Insurance Act, R.S.O. 1897, ch. 203, for, according to the true construction of the contract, "legal heirs" meant children, and on the death of the insured's only son the designation failed, and the insured had therefore the right to designate another beneficiary, which was properly exercised in favour of the daughter-in-law.

Judgment of MEREDITH, C.J.C.P., 9 O.L.R. 517, affirmed.

This was an appeal from the judgment of MEREDITH, C.J.C.P., declaring Mary Lawson Farley entitled to the proceeds of an insurance policy in a benevolent society called The Royal Templars of Temperance on the life of Arthur Farley.

The society by a beneficiary certificate upon the life of Arthur Farley, dated September 12th, 1901, agreed to pay \$2,000, to the beneficiary or beneficiaries designated in the certificate, power of revocation and substitution being reserved to the assured. By an endorsement on the certificate, made in the same month, the assured designated the beneficiaries as follows: "Harold E. Peagam, Charles R. J. Dinnick and William W. Farley, executors in trust for legal heirs." At this time a son, the said William W. Farley, and a grandson, John A. Farley, were alive. William W. Farley subsequently died, and after his death in November, 1903, the assured executed the following instrument in writing:

"Toronto, November, 1903.

"I, Arthur Farley, hereby declare that the money payable under the benefit certificate on my life issued to me by the

Royal Templars of Temperance, of which I am a member, shall be paid to my daughter-in-law Mary Lawson Farley for her own use and benefit.

"Witness: Thomas Wylie.

"Arthur Farley."

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By his will made about the same time he assumed to dispose of the moneys in favour of the said daughter-in-law.

Arthur Farley died in 1904, leaving him surviving the said grandson and daughter-in-law, and several brothers and sisters.

The grandson claimed that the declaration in favour of the "legal heirs" as beneficiaries was not revocable; that on the death of the assured he answered the description of legal heir and was therefore entitled to the insurance money.

The judgment appealed from is reported 9 O.L.R. 517.

The appeal was heard on May 8th, 1905, before a Divisional Court composed of BOYD, C., MEREDITH and ANGLIN, JJ.

W. R. Riddell, K.C., for the appellant John A. Farley.

A. Hoskin, K.C., for the respondent Mary Lawson Farley.

H. E. Rose, for the respondents, the executors.

June 8. BOYD, C.:—I would affirm the decision appealed from. I do not read the case of *Mearns v. Ancient Order of United Workmen* (1892), 22 O.R. 34, as deciding that the designation of the "legal heirs" of the assured as beneficiaries of the insurance money creates forthwith under the statute R.S.O. 1897, ch. 203, sec. 159, an irrevocable trust for such as answer that description at the death of the assured. The term "legal heirs" is to be read as if it were simply heirs (the lawfulness of the descent being implied), and though a technical term, yet it is also a flexible term, the meaning of which may vary according to the context, or according to the way in which it is regarded by the assured. See for instance what is said by Bacon, V.-C., in *re Steevens Trusts* (1872), L.R. 15 Eq. 110, 115, and the various cases reconciled or departed from in *Smith v. Butcher* (1878), 10 Ch. D. 113. It may be taken that the definition of the term "legal heirs" found in the Insurance Act, R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, is intended to remove the confusion of meaning, when the term is used in contracts

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of insurance of the person, though whether it is entirely successful may be questioned, owing to the limitation found in the introductory words of the section. But, without resort to that dictionary clause, I do not find that the assured by designating "legal heirs" as beneficiaries disqualifies himself from making another disposition of the fund if death changes the personnel of the prospective heirs before he himself dies. If he makes no change then of course the "legal heirs" will be definitely and individually ascertained at his death. But if the one who is his prospective legal heir at the time of the designation dies, the assured is then at liberty to make a change because he thus indicates that he does not intend to benefit those who may be his heirs at the time of his death. This very definition is noted by the excellent and careful judge who decided *Mearns v. Ancient Order of United Workmen*, 22 O.R. 34, for, as said by Ferguson, J., at p. 37: "If he intended to benefit his legal heirs at the time of his death he would rest satisfied and make no change."

In *Smith v. Butcher*, 10 Ch. D. 113, at p. 116, the Master of the Rolls said: "If I were at liberty to guess what he meant by the words 'lawful heirs,' I should guess that he meant 'children'; but I am not at liberty to guess."

But here the conduct of the assured shews that he meant "children" by the words "lawful heirs," for when his last surviving son died during the life of the assured he made the declaration in favour of his daughter-in-law, which is the last indication of his intention as to who should be his beneficiary. That last declaration should prevail, and there is nothing in the statute to countervail it.

The appeal should carry costs to the successful party.

MEREDITH, J.:—To bring a contract of insurance within the provisions of sec. 159, the declaration must be in favour of "the husband, wife, children, grandchildren or mother of the assured;" in this case it is in favour of the "legal heirs," which is in substance, as well as in form, a different thing, for the words "legal heirs" necessarily include many other persons than "the husband, wife, children, grandchildren or mother." A good declaration under sec. 159 is not made because the

"legal heirs" eventually happen to be some of the persons named in the section, and not other persons; the declaration must be in favour of "husband, wife, children, grandchildren or mother," a class given by the Act the name "preferred beneficiaries," not "legal heirs." The "legal heirs" are not within the protection of the section.

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ANGLIN, J.:—The policy in question dated 12th September, 1901, was upon the life of Arthur Farley, the father-in-law of the claimant, Mary Lawson Farley. The insured had when the policy issued, designated the beneficiaries in these terms:—"Harold E. Peagam, Charles R. J. Dinnick and William W. Farley, executors in trust for legal heirs." At that time his son William W. Farley was alive, as was also his grandson John A. Farley. No other descendants of Arthur Farley were living in September, 1901. His son William predeceased him; his grandson John A. survived him.

In November, 1903, the insured executed the following memorandum:—

"Toronto, November, 1903.

"I, Arthur Farley, hereby declare that the money payable under the benefit certificate upon my life issued to me by the Royal Templars of Temperance, of which I am a member, shall be paid to my daughter-in-law, Mary Lawson Farley, for her own use and benefit.

"Witness: Thomas Wylie.

"Arthur Farley."

The question for determination is the efficacy of this memorandum, the appellant contending that the original designation was that of a preferred beneficiary within R.S.O. ch. 203, sec. 159, and as such irrevocable.

At the time when the insured declared that the policy should be payable to his executors "in trust for his heirs," his son William alone answered that description, so far as any person can be said to be the heir of one living. Had he survived the insured the present claimant, John A. Farley, would have had no status. On the other hand, had both the son, William, and the grandson, John A., predeceased the insured, the words

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"legal heirs" would have described persons incapable of designation as "preferred beneficiaries." Speaking for myself, I am unable to regard a term so elastic in its application as a declaration within the purview of sec. 159, notwithstanding the decision in *Mearns v. Ancient Order of United Workmen*, 22 O.R. 34, that under a policy payable to "the legal heirs" of the assured, his children took as *personæ designatæ*, to the exclusion of his widow. That decision in nowise involved the question with which we are now concerned as to the sufficiency of the phrase, "legal heirs," as a designation of preferred beneficiaries.

But the provision of the Insurance Act referred to by the learned Chief Justice, R.S.O. 1897, ch. 203, sec. 2, sub-sec. 36, puts the matter beyond doubt. This sub-section, adopted in 1897, reads as follows: "In insurance of the person the phrase 'legal heirs' or 'lawful heirs' shall mean and include all the lawful surviving children of the assured, and also the wife or husband if surviving the assured; or, where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take according to the Statute of Distributions."

It is true that this provision is found in the interpretation section of the Insurance Act, the introductory words of which are :—

"Where the following words and expressions respectively occur in this Act, or in the schedules hereto, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears."

Mr. Riddell contends that these introductory words necessarily restrict the application of sub-sec. 36 to words and expressions occurring in the Act itself or the schedules thereto. Upon an examination of the Insurance Act and schedules, however, I fail to find anywhere, except in sec. 2, sub-sec. 36, itself, the phrase "legal heirs." In order to give to this provision some operation and effect, it must therefore be read as applicable to the use of the phrases "legal heirs" and "lawful heirs," in insurance policies, or documents relating thereto. The introductory words of sub-sec. 36—"In insurance of the person"—may well be regarded as intended to make these

clauses parenthetical and to withdraw them from the governance of the opening words of sec. 2. This is made very apparent when the form and phraseology of each of the other 56 sub-sections is considered.

So regarding and so applying sub-sec. 36 and reading it with sub-sec. 35, which distinguishes between children and grandchildren, we have here the case of an assured dying "without lawful surviving children and unmarried," with the consequence that the phrase "legal heirs" means "those persons entitled to take under the Statute of Distributions." This, in my opinion, precludes any argument that "legal heirs," so interpreted, can be deemed a designation of preferred beneficiaries under sec. 159.

The appeal fails and should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

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June 29.

REX v. DRUMMOND.

Criminal Law—Perjury—Evidence of Proceeding in which Offence Committed—Indictment and Trial—Production of Record—Certificate under Criminal Code, sec. 691—Conviction—Substantial Wrong or Miscarriage—Criminal Code, sec. 746 (f).

Upon a trial for perjury alleged to have been committed at a previous trial for a criminal offence, the fact of the previous trial must be proved by the production of the indictment and the formal record, or of a certificate under sec. 691 of the Criminal Code; the evidence of the clerk of the court, accompanied by the production of his minutes of the trial, and the evidence of the court stenographer who took down the evidence at the trial, are not proof of the indictment and trial.

Where there is no proper evidence of some fact essential to the proof of the crime charged and a conviction takes place, there is a substantial wrong or miscarriage at the trial, and sec. 746 (f) of the Code cannot be applied to uphold it.

Conviction by the chairman of the general sessions of the peace for the county of Brant set aside, and a new trial ordered.

CROWN case reserved by the chairman of the general sessions of the peace for the county of Brant.

The prisoner was indicted for perjury alleged to have been committed by him when called and sworn as a witness at the trial of one Kennedy on an indictment for murder, and the question reserved was, whether there was legal evidence of the indictment and trial for murder. The point is more fully explained in the judgments.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 17th May, 1905.

L. F. Heyd, K.C., for the prisoner, contended that there was no proper evidence of the proceedings in the course of which the offence of perjury was alleged to have been committed, citing sec. 691 of the Criminal Code; *Green v. Gatewick* (1673), Buller's Nisi Prius 243; *Regina v. Gordon* (1842), Car. & M. 410; *Rex v. Browne* (1829), 3 C. & P. 572; *Regina v. Coles* (1887), 16 Cox C.C. 165.

J. R. Cartwright, K.C., for the Crown, supported the conviction, referring to sec. 746 (f) of the Criminal Code; Arch. Crim. Pleading and Evidence, 22nd ed., p. 1003; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 69,

71; *Drew v. The King* (1903), 33 S.C.R. 228; *The Queen v. Woods* (1897), 2 Can. Crim. Cas. 159.

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June 29. OSLER, J. A.:—The prisoner was tried before a jury at the general sessions of the peace for the county of Brant for perjury alleged to have been committed by him when called and sworn as a witness at the trial of one Kennedy on an indictment for murder at a sittings of the Court of Assize held at Brantford before Street, J., in February 1904, and the question reserved was, whether there was legal evidence of that indictment and trial.

The only evidence given was that of the clerk of assize for the county of Brant, who swore that the prisoner Drummond was called as a witness on Kennedy's trial, and that as clerk of assize he had sworn the prisoner on the said trial; and he produced his "record" book which he kept as clerk of assize, in which he had entered as a witness sworn on the said trial the name of the prisoner, whom he identified as a witness who had been then sworn by him. The particulars set forth in the book shew the title of the cause; the names of the counsel; the request of the prisoner's counsel to have witnesses for the defence subpoenaed by the Crown; the finding by the grand jury of a true bill, not saying for what; the arraignment of the prisoner; the names of the jurors sworn, ordered to stand aside, and challenged; the names of the witnesses sworn for the Crown and for the prisoner; a statement of the exhibits produced; the hours at which the addresses for the Crown and for the prisoner and the Judge's charge were delivered, and of the retirement and return of the jury, and their verdict as recorded by the trial Judge.

The other evidence by the stenographer or court reporter related to the evidence which had been given by the prisoner at the former trial.

Neither the indictment on which Kennedy had been tried, nor any copy or sworn copy of it, was produced.

Counsel for the prisoner objected that there was no legal evidence of the trial of *Rex v. Kennedy*; that the production of the indictment and formal record of that case was necessary where no certificate under sec. 691 of the Code was put in.

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The learned chairman ruled that the evidence given by the clerk of the assize and the official court reporter was evidence of the trial, and that the production of the indictment or of the certificate referred to was not necessary; and the question he asks the Court to answer is, "Was I right?"

The only difficulty this question suggests is why it should ever have been necessary to put it.

One well-established requirement in the trial of such an indictment for perjury as the present is the legal proof of the trial at which the alleged perjury was committed.

Another, equally well established, is that, such trial being matter of record, it is to be proved by the production of the record of the former trial, that is to say, the sworn or exemplified copy of the indictment and of the verdict and judgment thereon, or by some authoritative document which the law has declared to be a sufficient substitute therefor: Roscoe's Criminal Evidence, 11th ed. (1890), pp. 804, 812; *Regina v. Coles*, 16 Cox C.C. 165; Arch. Crim. Pleading and Evidence, 22nd ed. (1900), p. 1012.

To simplify the proof in such cases it has long been the law, as it now stands in sec. 691 of the Criminal Code, that "A certificate containing the substance and effect only, omitting the formal part, of the indictment and trial for any offence, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court whereat the indictment was tried, or among which such indictment has been filed, or by the deputy of such clerk or other officer, shall, upon the trial of an indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment without proof of the signature or official character of the person appearing to have signed the same."

Such a certificate might apparently have been procured in a few minutes from the person the entries in whose book, not a legal record of anything, were detailed at such painful length at the trial of the prisoner; and why this was not done, in the face of the precise objection taken, passes all understanding. The record of the former trial should have been proved in one of the two ways I have pointed out, and, as it

was proved in neither, the question reserved by the learned Judge must be answered in the negative.

It was, however, urged by the learned deputy Attorney-General that the case was one for the application of sec. 746 (f) of the Code, and that the conviction ought not to be set aside, inasmuch as no substantial wrong or miscarriage had been caused by the mistake. The clause referred to provides that no conviction shall be set aside or new trial granted, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, unless, in the opinion of the Court, some substantial wrong or miscarriage was thereby occasioned at the trial.

The language of the clause is not quite the same as that of the New South Wales Act which was in question in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, and which provides simply that the conviction shall not be reversed in any case stated "unless for some substantial wrong or other miscarriage of justice." This was pointed out in *The Queen v. Woods*, 2 Can. Crim. Cas. 159 (British Columbia). Under our Act the mere improper admission or rejection of evidence is not a sufficient reason for disturbing the verdict unless some substantial wrong or miscarriage has been caused thereby, and of this the Court is necessarily the judge. But in the case at bar the question is not so much the admission of improper evidence, as whether the fact of the former trial has been proved. If the evidence wrongly admitted is, as it must be, disregarded, then, unless in its absence there is enough in the rest of the case to support the conviction, it follows that there must have been a substantial wrong or miscarriage at the trial. If, leaving aside the evidence wrongly admitted, or that which was wrongly admitted as evidence, an essential part of the proof of the crime for which the prisoner was tried is absent, the conviction is not according to law, since the crime was not legally proved, and there was thus an absolute defect in the proceedings at the trial. The saving clause, therefore, which is invoked by the Crown, cannot apply. And the conviction must be reversed and a new trial granted.

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MACLENNAN, J.A.:—The only question is, whether the conviction of the defendant for perjury can be supported against an objection taken at the trial that the proceeding on which the false evidence was alleged to have been given, was not proved by legal evidence.

The only evidence of the trial for murder given on behalf of the Crown was that of the clerk of assize and the official reporter. The former produced and verified the entries in his court book, consisting of the various steps taken in the course of the trial, the finding of a true bill, the arraignment, the calling and swearing of the jury, and the several witnesses, the addresses of counsel, the charge, and the verdict of not guilty. The official reporter produced and verified his notes of the evidence, including that of the defendant, and the extension thereof.

Neither the clerk's notes, nor his evidence, so far as appears, disclosed the nature of the charge which was being tried. That was proved by the official reporter.

Neither the indictment for murder, nor any certificate such as is authorized by sec. 691 of the Criminal Code, was produced or proved at the trial.

On the argument before us Mr. Cartwright, on behalf of the Crown, admitted the common law rule that the best evidence of which the case admits must always be produced; but he contended that the rule was qualified and relaxed, not only by sec. 691 above referred to, but also by sec. 746 (f) of the Criminal Code.

That section provides that on any appeal, such as the present, the Court may "(e) direct a new trial; or (f) make such other order as justice requires: provided that no conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial, or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial."

In *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, 69, sec. 423 of the Imperial Crown Law (Amendment) Act (1883), which closely resembles sec. 746 (f) of our Criminal

Code, was considered by the Judicial Committee, and Herschell, Lord Chancellor, expressed the opinion of the Committee, that that Act does not empower the Court to affirm a conviction when the evidence submitted to the jury was inadmissible, and might have influenced the verdict, and that so to do would be an assumption by the Court of the functions of the jury. The Committee, however, expressly guarded themselves against being supposed to determine that the Act might not be relied on in cases where it is impossible to suppose that the evidence improperly admitted could have had any influence on the verdict of the jury, as, for example, where some merely formal matter, not bearing directly on the guilt or innocence of the accused, has been proved by other than legal evidence.

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It might be contended with great force in this case that the proof of the indictment, and the trial had thereon, was a merely formal matter, not bearing directly on the guilt or innocence of the accused. But the fact of the murder trial was an essential part of the case against defendant, and had to be proved. The jury had to pass upon the clerk's evidence, and that was for them alone, and not for this Court; and upon the whole I think this case is not within sec. 746 (f) so as to enable us to uphold the conviction.

There is, however, another consideration which seems entitled to great weight. The common law rule, which requires the best evidence to be given in all cases, is one which ought not to be lightly disregarded, or departed from. Parliament has, in sec. 691 of the Code, thought fit to relax that rule in the specific kind of case now before us, and to authorize a certificate to be substituted for the record which was formerly required. That being so, I do not think we ought, without clear words, to interpret sec. 746 (f) of the same Act as going much further than sec. 691, and dispensing not merely with the production of the record, but also with the certificate which that section authorized to be substituted in its stead.

I am of opinion that the conviction should be quashed, and that there should be a new trial.

MOSS, C.J.O., GARROW, and MACLAREN, JJ.A., concurred.

T. T. R.

[DIVISIONAL COURT.]

D. C.

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Oct. 31.

FISKEN V. MARSHALL.

Life Insurance—Assignment—Assignee's Selection of Option—Revocation of Selection—Husband and Wife—Declaration in Wife's Favour—Attachment of Debts.

The assured assigned shortly before its maturity an endowment policy to a creditor by an assignment absolute in form, there being an agreement however that the creditor should apply to the company for the cash surrender value and should pay the surplus thereof over his indebtedness to the assured's wife. The assignee after the time limited by the policy for the purpose elected to take the cash surrender value. After this a judgment creditor of the assured obtained an attaching order against the company. The assignee then before any action had been taken by the company in respect of the election made by him revoked it and the husband executed a declaration that the policy was to be held, subject to the assignment, for the benefit of his wife :—

Held, that the assignee's election not having been made within the time limited was a mere proposal to the company; that his revocation before action taken by the company put an end to it; and that the cash surrender value was not payable by the company.

Held, also, that in any event, notwithstanding the attaching order, the assured's declaration in his wife's favour took effect and defeated the attaching creditor's claim.

The principle of *Weekes v. Frawley* (1893), 23 O.R. 235, approved and applied. Judgment of WINCHESTER, Co. J., affirmed.

APPEAL by the plaintiff from the judgment of the senior Judge of the county court of York discharging an attaching order.

The plaintiff having obtained a judgment against the defendant for payment of money sought to garnish in the hands of the New York Life Insurance Company an amount said to represent the cash surrender value of an insurance policy on the life of the defendant.

The policy in question was an endowment policy maturing on the 30th of June, 1905, and it provided that upon completion of the endowment period one of several specified options might be exercised by the insured, one of these options being the acceptance of the surrender value in cash, notice in writing of the insured's election to be given not less than three months prior to the maturity of the policy and in default of notice within that time the insurance to be continued and the accumulated surplus to be applied in the purchase of an annuity.

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On the 18th of April, 1905, the plaintiff assigned all his right, title and interest in the policy to his solicitor to whom he was at that time indebted to the amount of about \$40, the assignment though absolute in form being it was alleged made on the condition that the assignee was to apply to the company for the cash value of the policy and after deducting his own debt from the amount was to pay the balance to the defendant's wife.

On the 30th of May, 1905, the plaintiff obtained judgment against the defendant for \$75 debt and \$19.82 costs. On the same day notice of the assignment to him was given by the solicitor to the insurance company and on the same day also the solicitor made in writing what purported to be an election to take the cash value of the policy.

On the 31st of May, 1905, the plaintiff obtained and served upon the insurance company an attaching order.

On the 23rd of June, 1905, the solicitor, the insurance company having given no acknowledgment of his election and having done nothing in respect thereof, gave them notice in writing revoking the election.

On the 29th of June, 1905, the defendant made a declaration pursuant to the provisions of the Ontario Insurance Act, sec. 159, declaring that the policy and the money to be derived therefrom were to be for the benefit of his wife subject to the assignment above mentioned to the solicitor.

The learned senior Judge of the county court held that the declaration was valid and effective, and that on that ground if not upon others the attaching order was defeated.

The appeal was argued before a Divisional Court [FALCONBRIDGE, C.J.K.B., BRITTON, and CLUTE, JJ.] on the 31st of October, 1905.

R. E. Kingsford, for the appellant. The alleged oral agreement in the wife's favour at the time of the making of the assignment to the solicitor cannot be relied on as it was voluntary and made with intent to defeat creditors. The solicitor's election to take the cash value of the policy is valid

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and binding and it could not be revoked after the attaching proceedings had been taken. Neither is the declaration in favour of the defendant's wife of any avail. By the issue and service of the attaching order the plaintiff had become in effect an assign of the defendant and the declaration made after that time in favour of the defendant's wife must be subject to the plaintiff's claim.

Edward Bayly, for the respondents. There was in fact a parol trust declared in favour of the defendant's wife at the time of the assignment of the policy and there is no reason why that should not be given effect to. At any rate the solicitor's election having been made after the time limited by the policy was of no avail without the company's acceptance, and having been revoked before acceptance it became of no effect. Moreover the declaration by the assured even although made after the attaching order had been served was valid and effective and removes the insurance from the control of the assured or his creditors: *Weekes v. Frawley* (1903), 23 O.R. 235, at p. 242.

Kingsford, in reply.

FALCONBRIDGE, C.J. (at the conclusion of the argument):—We are all agreed that the declaration in favour of the defendant's wife is valid. The judgment of Mr. Justice Robertson in *Weekes v. Frawley* is very strong, and, although this point did not come up directly for decision in that case, the rest of the Court seem to have taken no exception to his remarks. The wording of the statute seems clear and plain. The appeal will therefore be dismissed with costs.

BRITTON, J.:—I may add to the judgment of the Chief Justice that, in my opinion, the money was not attachable. There was no sum of money or debt due or payable, the time having elapsed and the election having been made too late. The assignee's revocation was communicated to the garnishees before their acceptance of his election, and they had no right or power to prevent such revocation. I agree with the Chief Justice also with regard to the declaration in favour of the defendant's wife.

CLUTE, J.:—I agree. I may also add that in the absence of authority I would hold that an assignee taking a life assurance policy as security for a debt would have no right to make a selection of the cash surrender value, thus completely changing the character of the security.

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[IN THE COURT OF APPEAL.]

REX V. HARKNESS.

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Criminal Law—Unlawfully Making Contracts for Sale of Stock—Keeping Common Gaming House—Stock Transactions on Margin—Agent for Broker—Evidence—Onus—Criminal Code—Aiding and Abetting—Evidence—Improper Reception—No Substantial Wrong or Miscarriage.

The defendant was convicted of unlawfully making contracts purporting to be for the sale of stock, goods, wares, or merchandize, in respect of which no delivery thereof was made or received, without the *bond fide* intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to sec. 201 of the Criminal Code, and of being the keeper of and keeping a common gaming house, contrary to that section.

The defendant carried on a business in a town in Ontario as "Harkness & Co., Brokers, Stocks, Grain, and Provisions." He was not a member of a Stock Exchange, but asserted that he was the agent of a firm of operators in Pennsylvania, with a branch in Buffalo, N.Y. When giving their orders, the persons who dealt with the defendant deposited with him sums of money not exceeding a margin of 2 per cent. in the case of stocks and 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telegraphed to that office, and the next day the defendant handed to the customer a paper, signed Harkness & Co., brokers, notifying the customer that he had bought the commodities specified from their principals, at the price named, for delivery on demand, subject to the contract, etc. Save this document, there was no delivery. If the stocks, grain, or provisions held by the customer went up in price, he directed the defendant to sell out, and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. The defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day. No interest was charged:—

Held, that the proper inference from all the facts shewn was that there was an understanding between the defendant and the customers that the stocks, grain, or provisions should never be called for or delivered, and that differences only should be dealt with. It was open to the Court to find, against

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the form of the papers that passed and the testimony of the parties themselves, that, notwithstanding the ostensible terms, there was a secret understanding. The evidence supported the finding that there was no intention on the part of any one to transfer any property to any one—that the transactions were merely bets on the rise and fall of the market, or gambling transactions.

The opinion evidence of two witnesses, so far as they assumed to deal with the question of the legality or illegality of the transactions, should not have been received; but, as no substantial wrong or miscarriage was occasioned, and a case was established against the defendant without the opinion evidence, the first proviso of sec 746 (1) (f) of the Criminal Code should be given effect to.

Semble, that, upon the proper construction of sec. 704 of the Code, when upon the trial of a person charged under sub-clause (b) of sec. 201 (1) it is established that he has made or signed, or has acted, aided, or abetted in the making or signing of, a contract for the sale or purchase of the specified commodities, and there is no delivery at the time, the onus of shewing a *bona fide* intention to deliver or receive is upon the person charged.

Held, that the customer and Richmond & Co., having, by the aid of the defendant, committed the offence prohibited by sec. 201 (1) (b), the defendant had done acts for the purpose of aiding them to commit the offence, and abetted them in the commission of the offence, and, under sec. 51 of the Code, became a party to and guilty of the same offence, and there was no reason why he should not be charged as a principal.

The contracts were made in Canada: *Pearson v. Carpenter* (1904), 35 S.C.R. 380.

Sub-section 3 of sec. 201 is a legislative declaration that an office or place of business of the character kept by the defendant is a common gaming house, and so a common nuisance, and that a person maintaining such a place is the keeper of a common gaming house; and this is an offence for which he may be indicted—a penalty being provided by sec. 951 of the Code; and therefore (OSLER, J.A., *dubitante*), the conviction under sub-sec. 3 was properly made.

CASE stated by the Judge of the county court of Welland pursuant to an order of this Court made upon the application of the defendant, after trial and conviction upon charges of unlawfully making contracts purporting to be for the sale of stock, goods, wares, or merchandise, in respect of which no delivery thereof was made or received, without the *bona fide* intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to sec. 201 of the Criminal Code, and of being the keeper of and keeping a common gaming house contrary to said section.

The defendant elected to be tried and was tried by the Judge without a jury.

The following were the questions submitted for the opinion of the Court:

1. Does the evidence given on behalf of the Crown prove an offence against sec. 201 of the Criminal Code, under which the indictment was laid?

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2. Whether the evidence shews that the contracts charged in the first and second counts of the indictment were made or authorized by the defendant, and, if the evidence shews that the defendant had no interest in either of the transactions with which he is charged in said counts except the payment of his commission, which was a fixed amount and was payable to him whether the price of wheat or of the stock, the subject of such transaction, rose or fell or remained stationary, can the conviction upon such counts or either of them be sustained ?

3. Whether the evidence shews that the contracts charged in the first and second counts of the indictment were made within the Dominion of Canada and whether the conviction upon said counts can be sustained ?

4. Whether the evidence of J. G. Beaty and Clarence W. Cady received by the county Judge upon the trial of the accused herein was admissible as evidence, and having been received, should such conviction be sustained ?

5. Whether the defendant could properly be convicted of an indictable offence under sub-sec. 3 of sec. 201 of the Criminal Code.

6. Whether the defendant is liable to a penalty or punishment in respect of an offence under sub-sec. 3 of sec. 201 of the Criminal Code, by virtue of sec. 951 or otherwise, under the Code or under the common law.

The case was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A., on the 15th May, 1905.

E. F. B. Johnston, K.C., for the defendant, contended that the evidence did not sustain the conviction ; that the defendant was merely an agent ; that the evidence of Beaty and Cady was improperly admitted ; that the evidence did not shew a nuisance and did not justify a conviction for keeping a common gaming house. He referred to *Regina v. Priestman*, an unreported case before Rose, J. ; *Forget v. Ostigny*, [1895] A.C. 318 ; *Thacker v. Hardy* (1878), 4 Q.B.D. 685 ; *The Queen v. Dowd* (1899), 4 Can. Crim. Cas. 170 ; *Pearson v. Carpenter* (1904), 35 S.C.R. 380.

J. R. Cartwright, K.C., for the Crown, *contra*.

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MOSS, C.J.O.

June 29. MOSS, C.J.O.:—The evidence shews that from the beginning of January, 1904, until the information was laid, some time after the 1st March in the same year, the defendant was occupying a room or office in the town of Niagara Falls, Ontario, in which he was carrying on a business under the name and style of Harkness & Co. The nature of the business may be learned from a circular issued by the defendant, a copy of which, dated the 23rd February, 1904, is in evidence. It is headed "Office of Harkness & Co., Brokers, Stocks, Grain & Provisions." After a reference to the advanced prices of May wheat and pork as compared with the prices less than four weeks before, it continues: "Figure out for yourselves what a neat little turn you could have made on these staples with only a very small investment. A word to the wise, etc." "Come and see us. We quote all the sales made on both Chicago and New York Exchange. Our service is unsurpassed. We buy and sell stock on only two points margin—grain and provisions only one point. No interest charges."

These attractive and suggestive statements seem to have drawn a good number of persons to the office, with whom the defendant had transactions. Generally speaking, these transactions took the shape of orders for the purchase of stocks, grain, or provisions. The defendant is not a member of the Stock Exchange at New York or Chicago, and he did not deal directly with either of these cities. He claims to be a branch or agency of a firm of operators known as Richmond & Co., whose head office is in Pittsburg, Pennsylvania, with a branch in Buffalo, N.Y. The defendant swore that he did not know whether any member of the firm of Richmond & Co. was a member of either of these exchanges. This statement is all the more remarkable because of the fact that the trial was postponed from time to time from the 17th March to the 16th May, on which day the defendant, who had testified on the first day of the trial, again testified on his own behalf. It is somewhat surprising that, if he had not endeavoured to ascertain before, he should not have done so during the progress of, the trial.

When giving their orders the persons who dealt with the defendant deposited with him sums of money, never exceeding, as far as appears, a margin of 2 per cent. in the case of stocks

or 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telegraphed to the Buffalo office, and the next day the defendant handed to the customer a paper, signed Harkness & Co., brokers, containing amongst other things a notification to the customer as follows :

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" Mr. ———

" You have bought from Richmond & Co., Pittsburg, at the price named in this memorandum, for delivery on demand subject to the contract and notice and provisions above and herein." In the margin appear the words, " I consent and agree to the contract expressed hereon," but the customer was not required or expected to sign, and apparently never did sign it. Save this document there was no delivery, and it was proved that in answer to a question put to him by the chief of police, to whom he was explaining the nature of the business, the defendant stated that he did not deliver goods or stock—the people did not do business that way. If the stocks, grain, or provisions held by the customer went up in price, he directed the defendant to sell out, and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. The defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day.

There is evidence that the ordinary mode of dealing by brokers who are members of the Stock Exchange either in New York or Chicago, in the purchase of stocks, grain, or provisions, is to require a deposit said to be usually 8 or 10 per cent. in the case of stocks, and 5, or in exceptional cases 3, per cent. in the case of grain and provisions. In order to complete a purchase he borrows from a bank, upon the deposit of the certificates, the amount beyond the customer's deposit necessary to make up the price paid. When the price falls to the extent of the margin, he requires the customer to remargin or make a further deposit—and if this is done, and so long as it is done, the transaction is carried until the customer desires to pay the balance of the purchase price and take over the commodity or to sell. Upon

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a sale being made, the broker deducts his charges, including interest paid to the bank, commissions, and other interest and charges (if any), from the purchase money.

The transactions in which the defendant was concerned appear to bear little resemblance to those mentioned, and it does not require the aid of the so-called expert opinions of Messrs. Beaty and Cady to enable the distinctions to be clearly seen.

Upon the evidence it is not to be credited that the persons who dealt with the defendant upon the terms set forth in his circular and appearing by the testimony, gave the defendant authority to enter into contracts for them on the Exchanges, or that the defendant supposed or believed that a contract of that nature was intended to be entered into by any one. So far as appears, the persons who dealt with the defendant were strangers to Richmond & Co. and to him. They came to his office in response to the invitation contained in his circular. No inquiries as to their means or standing seem to have been made, no steps to ascertain whether they were in a position to answer further calls or to make good a contract on their own behalf. All that was required was the small deposit of 1 or 2 per cent. on the supposed purchase. Yet it is asked that it be believed that Richmond & Co. were willing to become liable for a real purchase and for the funds necessary to carry it out upon the slender security of a margin of 1 or 2 per cent. put up by strangers to them and of whose means they knew nothing. The proper inference from all the facts shewn is, that there was an understanding between the defendant and the customers that the stocks, grain, or provisions should never be called for or delivered, and that differences only should be dealt with. It was open to the learned county court Judge to find, as a jury might, against the form of the papers that passed and the testimony of the parties themselves, that notwithstanding the ostensible terms there was a secret understanding: *Universal Stock Exchange v. Strachan*, [1896] A.C. 166; *In re Gieve*, [1899] 1 Q.B. 794. His finding that there never was the slightest intention on the part of any one, either the purchaser or Richmond & Co., to transfer any property to any one—that they were merely bets on the rise and fall of the market—gambling transactions pure and simple—is supported by the

evidence. And this conclusion may be reached without reference to the opinions expressed by Messrs. Beaty and Cady. So far as they assumed to speak of the legality or illegality of the transactions in question, their testimony should not have been received. But, as there was no jury, and we are able to see that without reference to the opinion evidence a case is established against the defendant, no substantial wrong or miscarriage appears to have been occasioned by the reception of the evidence, and the first proviso of sec. 746 (1) (f) may be given effect to.

If, as contended for the defendant, the onus was on the Crown to establish the want of *bond fide* intention to acquire or sell the commodities in question, or to deliver or to receive delivery thereof, that onus has been discharged. This conclusion probably makes it unnecessary to consider the effect of sec. 704 of the Code, which enacts that "whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section 201, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the *bond fide* intention to acquire or to sell such goods, wares or merchandise, or to deliver or receive delivery thereof, as the case may be, shall rest upon the person so charged."

The proper construction of this section is not free from difficulty. It is argued with considerable force that as the words "any such contract or agreement of sale or purchase" plainly refer to the contract or agreement to be made or signed under sec. 201, they must be read as meaning a contract or agreement which has been already shewn to have been made or signed without the *bond fide* intention of acquiring or making or receiving delivery, and so it is useless to say that when that is established the onus shall yet be upon the person charged.

This construction, which is obviously opposed to the intention of Parliament, ought not to be placed upon the language of the section if it is fairly capable of one more consonant with the intention.

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The defendant is charged under sub-clause (b) of sec. 201 (1), which strikes at the making or signing or authorizing the making or signing of a contract or agreement for the sale or purchase of the commodities specified, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bond fide* intention to make or receive such delivery. In this provision the first element is the making or signing of a contract or agreement, there being no delivery at the time. The second element is the want of a *bond fide* intention to make or receive delivery at any time. And the words "any such contract or agreement of sale or purchase" in sec. 704 are satisfied by relation to the first element in sub-clause (b) of sec. 201 (1). So that when upon the trial of a person charged under that sub-clause it is established that he has made or signed, or has acted, aided, or abetted in the making or signing of, a contract or agreement for the sale or purchase of the specified commodities, and there is no delivery at the time, the onus of shewing a *bond fide* intention to deliver or receive is upon the person charged.

This view is not necessarily in conflict with an opinion said to have been expressed by the late Mr. Justice Rose in the unreported case of *Regina v. Priestman*. The learned Judge was dealing with sec. 2 of 51 Vict. ch. 42, in relation to sec. 1 of the same Act, the substance of which is to be found in secs. 201 and 704 of the Code. But the arrangement and language of the present provisions are quite different, especially as regards sec. 704, which takes the place of sec. 2 of the 51 Vict. The words "as aforesaid" after the words "such contract," which appear to have created much of the difficulty, no longer occur, and the words "or agreement of sale or purchase" have been put in their stead. Yet it may be said that in view of the doubts raised there is reason for further legislation in order to remove them.

With regard to the defendant's position that he is only an agent receiving a commission and is therefore not liable. Upon his own admissions his office is a branch of Richmond & Co., he is engaged in soliciting, attracting, or inducing persons to deal with Richmond & Co. through him in illegal transactions, and, as the learned county Judge has found, he had a guilty know-

ledge of the nature of the dealings. And it may also be said that he authorized the making and signing of the contracts with Richmond & Co. Through his intervention a contract or agreement is effected with Richmond & Co. And, as the learned Judge has pointed out, there is no purchase shewn on the Exchange for or on account of the customer. There is nothing but a contract or agreement with Richmond & Co., to which the defendant is a party with knowledge of its real nature. The customer and Richmond & Co., through and by the aid of the defendant, have committed the offence prohibited by sec. 201 (1) (b), and the defendant has done acts for the purpose of aiding them to commit the offence, and has abetted them in the commission of the offence.

Now at common law one who aided and abetted in the commission of an offence thereby rendered himself liable as a principal. Then sec. 61 of the Criminal Code expressly declares that every one is a party to and guilty of an offence who (b) does or omits an act for the purpose of aiding any person to commit the offence; or (c) abets any person in commission of the offence. That is to say, by aiding or abetting in the commission of an offence he becomes a party to and guilty of the same offence. Thus he becomes a party principal, and there appears to be no reason why he should not be indicted or charged as a principal under the Code. See *The Queen v. Campbell* (1899), 2 Can. Crim. Cas. 357.

Upon the evidence it must be held that the contracts charged in the first and second counts of the indictment were made in Canada—according to the holding of the majority of the Judges of the Supreme Court in *Pearson v. Carpenter*, 35 S.C.R. 380.

The conviction of the defendant under sub-sec. 3 of sec. 201 was properly made. By that sub-section it is declared that every office or place of business wherein is carried on the business of making or signing, or *procuring* to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited by this section, is a common gaming house, and every one who as principal or agent occupies, uses, manages, or maintains the same is the keeper of a common gaming house.

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Keeping a common gaming house was an indictable offence at common law on the principle expressed in Hawkins Pleas of the Crown, that all common gaming houses are nuisances in the eyes of the law : *The King v. Rogier* (1823), 1 B. & C. 272, 25 R.R. 393. Sub-section 3 of sec. 201 is a legislative declaration, first, that an office or place of business of the character described is a common gaming house and so a common nuisance, and secondly, that a person occupying, using, managing, or maintaining such a place, either as principal or agent, is the keeper of a common gaming house. And this is an offence for which he may be indicted. The objection that no penalty or punishment is provided is answered, as the learned county court Judge pointed out, by reference to sec. 951.

The evidence brings the case against the defendant within these provisions of the Code.

All the questions should be answered in favour of the Crown (the answer to the fourth question being specially framed with reference to sec. 746 of the Code), and the conviction should be affirmed.

MACLENNAN, GARROW, and MACLAREN, JJ.A., concurred.

OSLER, J.A.:—I agree in the result. No one can read the evidence of the defendant himself, of the chief constable, and of Robertson and Lerch, the former of whom was party to the transactions which led to the prosecution, without being convinced that there never was any *bona fide* intention on the part of the defendant as agent or broker or manager for Richmond & Co., or of Richmond & Co. as sellers, to make, or on the part of Robertson to receive, delivery of the wheat and shares which they professed to be dealing in. The parties were, to the knowledge of both of them, simply gambling in differences, and their transactions were mere bets and not real purchases of shares or goods, and were, I should hold upon the evidence I have referred to, and notwithstanding the form of the contract (*Universal Stock Exchange Co. v. Strachan*, [1896] A.C. 166; *In re Gieve*, [1899] 1 Q.B. 794), clearly within sec. 201 of the Code. I think the learned Judge of the county court regarded this evidence as sufficient to support the conviction, although he

refers at some length to what was called expert or opinion evidence as to what constituted a "bucket shop," and the difference between transactions which characterize a place of that kind and those of a regular or *bona fide* dealer. I do not rest my judgment on this evidence, much of which I think was entirely inadmissible, but, under sec. 746 (f) of the Code, disregard it on the ground that no substantial wrong or injustice has been occasioned thereby. It is not necessary under the circumstances to consider sec. 704 as to the onus of proof in these cases, as the Crown has proved the absence of *bona fides* in fact.

The defendant was, no doubt, an agent, but under sec. 61 of the Code was properly chargeable with the offence as principal: *The Queen v. Campbell*, 2 Can. Crim. Cas. 357, *per* Wurttele, J.

As regards the charge and conviction for keeping a common gaming house I have felt more difficulty.

Section 196 of the Code has defined what a common gaming house is, and sec. 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any common gaming house as *hereinbefore defined*. Section 201 (3) declares that every one who as principal or agent occupies, uses, manages, or maintains an office or place in which business of the kind prohibited by sub-sec. 1 of that section is done, is the keeper of a common gaming house, but, as it is not a common gaming house as defined in sec. 196, the keeper is not indictable under sec. 198, which only reaches the keeper of a common gaming house as *thereinbefore defined*, that is to say, by sec. 196.

Section 201 (3) has not expressly made the keeping of the office or place, an indictable offence, as sec. 198 has done in reference to common gaming houses as defined by sec. 196, and the doubt I have felt is, whether the section having attached the name of the common law offence to the act referred to in it, that is, by declaring that the keeper of the house in which the forbidden business is done, is the keeper of a common gaming house, he is to be regarded as guilty of the common law offence and indictable as such, though such acts would (probably) not have been proof of an indictment for the offence at common law.

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My learned brethren, I believe, are all of opinion that the section merely declares what shall be evidence of the common law offence of keeping a common gaming house, which is, of course, a public nuisance, and as such an indictable offence, and to which, therefore, no punishment having been expressly provided for it, sec. 951 of the Code, as amended by 56 Vict. ch. 32, applies. I do not regret that this conclusion has been reached and shall not dissent from it, though my doubt, most likely not well founded, is yet not entirely removed, as the result of the case will no doubt help to stamp out a practice so long prevalent in, and so prejudicial to, the community.

It will be observed that the defendant has been convicted, on practically the same evidence, of two offences involving separate punishments, the maximum of which is extremely severe, but the learned county Judge will, no doubt, take into consideration the facts that the prosecution is the first one under the Code as amended, and that it seems to have been brought as a test case.

T. T. B.

[IN THE COURT OF APPEAL.]

DOYLE V. DIAMOND FLINT GLASS COMPANY.

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Release—Repudiation—Fraud—Restoration of Money Paid—Negligence—Fatal Injuries Act—Expectation of Benefit.

Upon appeal by the defendants from the judgment of a Divisional Court, 8 O.L.R. 499, as to some of the questions arising in the action, and upon cross-appeal by the plaintiff upon one question :—

Held, affirming the judgment, that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence ; that the plaintiff was not entitled to recover any damages on behalf of the mother of the deceased ; and that the release was procured from the plaintiff under circumstances that rendered it invalid as a bar to the plaintiff's claim.

It was argued before the Court of Appeal that because the plaintiff, while repudiating the release, had not restored or offered to restore the money paid as the consideration for her executing it, she was not in a position to attack the transaction :—

Held, that the plaintiff had not before action elected to affirm or disaffirm the transaction, and the bringing of the action was a declaration of intention to disaffirm. The release having been found invalid, the plaintiff should not be deprived of the benefit of that finding ; but, being relieved, she should be required to return or otherwise make good the money paid to her ; and she was permitted to bring it into Court.

Hewson v. Macdonald (1882), 32 C.P. 407, distinguished.

Lough v. London and North Western R. W. Co. (1871), L.R. 7 Ex. 26, followed.

APPEAL by the defendants and cross-appeal by the plaintiff from the judgment of a Divisional Court, 8 O.L.R. 499.

The action was brought by Mary Doyle to recover damages for the death of one John Doyle, alleged to have been the husband of the plaintiff, and to have met his death by reason of the negligence of the defendants, in whose service he was at the time of his decease.

The defendants denied the negligence, denied that the plaintiff was the lawful widow of John Doyle, and set up a release given by her on payment of \$250. The plaintiff replied that the release was obtained by fraud and misrepresentation. The plaintiff commenced the action in her own right as widow, but during its progress obtained letters of administration to John Doyle's estate, and amended her pleading by claiming as administratrix as well as in her individual capacity.

The action was tried before IDINGTON, J., and a jury, and during the progress of the trial, at the plaintiff's request, she

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was allowed to amend further by claiming not only on behalf of herself, but also for the mother of the deceased. Questions as to the negligence of the defendants and as to the damages were left to the jury, who answered them in favour of the plaintiff, and assessed the damages at \$1,500, apportioning \$750 to the mother.

The trial Judge reserved all other questions for his own consideration, and afterwards gave judgment (7 O.L.R. 747) holding that the plaintiff was not the lawful widow of John Doyle, he having a wife alive when he married the plaintiff. He also found that the plaintiff, not being the widow, was not entitled to claim as administratrix on the grant obtained during the action. He also found that there was no fraud on the defendants' part in the procuring of the release from the plaintiff, and that the plaintiff was not incompetent at the time of its execution and understood her position, and he dismissed the action without costs.

The plaintiff moved before the Divisional Court to set aside the judgment, and to enter judgment for her for \$1,500, or for a new trial in respect of the issues found by the Judge, upon the ground of the discovery of new evidence shewing that when the deceased married the person found to be his wife, the latter had another husband then and still alive.

The defendants also moved to set aside the findings of the jury as to negligence and damages, contending that there was no evidence of any pecuniary damage to the plaintiff or the mother of John Doyle, and that the release, having been found valid, should be held to be binding on the plaintiff in her own right and as administratrix.

The Divisional Court gave judgment (8 O.L.R. 499) ordering a new trial, confined to the question whether the plaintiff was at the commencement of the action the lawful widow of the deceased, and if so as to the damages she was entitled to, and declaring the release not binding on her, and declaring that the mother was not entitled to any damages.

From this judgment, so far as it was against the defendants, except as to the part directing a new trial of the question whether the plaintiff was or was not the lawful widow of the deceased, the defendants appealed.

The cross-appeal of the plaintiff was upon the ground that the decision of the Divisional Court, so far as it disallowed the claim made on behalf of the mother, was wrong.

The appeal and cross-appeal were heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 19th May, 1905.

G. F. Shepley, K.C., and *R. H. Greer*, for the defendants. There was no evidence as to the cause of the injury and no evidence of negligence on the part of the defendants. There is nothing to shew how the accident happened; the deceased made no complaint as to danger; he knew the condition of the machinery and the nature of the work, and it was left to him to do it in the way he thought best; he acted voluntarily. There was no evidence of negligence to go to the jury: *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595; *Canadian Coloured Cotton Mills Co. v. Corcoran* (1899), 29 S.C.R. 478. The trial Judge's finding that the release was obtained fairly and without fraud upon the plaintiff, after she had recovered from the shock of her husband's death, and that she understood her position, is at least equal to the finding of a jury, and should not have been disturbed: *Scott v. Dent* (1876), 38 U.C.R. 30, at p. 34. The Divisional Court held that the letters of administration, although obtained during the action, related back to the death. The plaintiff, therefore, as administratrix, is bound by the release: *Trice v. Robinson* (1888), 16 O.R. 433. The plaintiff having accepted the money and used it, and the parties not having been restored to their former position by the return of the money, the release cannot be set aside: *Hewson v. Macdonald* (1882), 32 C.P. 407. She cannot set up fraud in answer to the release and at the same time take and keep the money.

A. R. Clute, for the plaintiff. It is not necessary to restore the money before repudiating the release; the plaintiff can be ordered to do equity by accounting: 24 Am. & Eng. Encyc. of Law, 2nd ed., pp. 320, 321; *North American Life Assurance Co. v. Brophy* (1901), 2 O.L.R. 559. The release was obtained by fraud when the plaintiff was in no position to transact business, under the guise of kindness, and without the aid of a

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solicitor in her behalf. The issue was properly determined in her favour: *Waters v. Donnelly* (1884), 9 O.R. 391; *Evans v. Llewellyn* (1787), 1 Cox Eq. 333; *In re Garnett* (1885), 31 Ch. D. 1; *Sargent v. Wedlake* (1851), 11 C.B. 732; *Johnson v. Grand Trunk R.W. Co.* (1893-4), 25 O.R. 64, 21 A.R. 408; *Haist v. Grand Trunk R.W. Co.* (1894-5), 26 O.R. 19, 22 A.R. 504; *Davidson v. Merritton Wood and Pulp Co.* (1898), 18 P.R. 139. There is ample evidence of negligence to sustain the findings of the jury. The shaft should have been protected or it should not have been in motion while the deceased was at work. I refer to *Griffiths v. Hamilton Electric Light and Cataract Power Co.* (1903), 6 O.L.R. 296; *Billing v. Semmens* (1904), 7 O.L.R. 340, 8 O.L.R. 540; *Bisnaw v. Shields* (1904), 7 O.L.R. 210; *Webbin v. Ballard* (1886), 17 Q.B.D. 122; *Sault Ste. Marie Pulp and Paper Co. v. Myers* (1902), 33 S.C.R. 23. The evidence shows that the deceased contributed to the support of his mother, and that she had a reasonable expectation of pecuniary benefit in the future: *Rombough v. Balch* (1900), 27 A.R. 32.

Shepley, in reply. The settlement was a provident bargain in the circumstances and was made in good faith. There was no fraudulent misrepresentation: *Lumbers v. Gold Medal Furniture Manufacturing Co.* (1899), 30 S.C.R. 55.

[THE COURT at the hearing dismissed the defendants' appeal, except as to the release, and also the cross-appeal.]

June 29. The judgment of the Court was delivered by Moss, C.J.O.:—During the argument of this appeal we disposed of every question raised except that of the right of the plaintiff, Mary Doyle, to maintain this action, notwithstanding the payment by the defendants to her or on her account before action of a sum of \$250, and the execution by her of an instrument purporting to release the defendants from all claims. We were of opinion that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence. We were also of opinion, on the cross-appeal, that the judgment of the Divisional Court holding that the plaintiff was not entitled to recover any damages on behalf of the

mother of the deceased was right. The only question reserved was as to the release.

Upon the evidence we see no reason for differing from the conclusion unanimously arrived at by the Judges of the Divisional Court that the release was procured under circumstances that rendered it invalid as a bar to the plaintiff's claim. But there was urged before us an objection to the maintenance of this action which does not appear on the pleadings or in the reasons for appeal, and does not seem to have been urged at any earlier stage. It is said that the plaintiff while repudiating the release has not restored or offered to restore the money paid to or for her as the consideration for her executing it. And it is argued that on that account the plaintiff is not in a position to attack the transaction. For this proposition much reliance was placed upon the case of *Hewson v. Macdonald*, 82 C.P. 407. But an examination of that case shews that the circumstances were entirely different. It is to be borne in mind, in considering a case of this nature, that the question whether at the time of the bringing of the action the person against whom a release is set up has done any act which has precluded him or her from impeaching it, is one of fact depending on the circumstances. This was recognized in *Burnes v. Richards* (1902), 18 Times L.R. 328, 330. The bringing of an action is in itself a declaration of intention to disaffirm and rescind. Up to that time the plaintiff may keep open the question whether he or she will affirm or disaffirm the transaction, subject of course to being held bound by delay if in the meantime third parties have acquired interests dependent on the transaction, or the position of the defendant has been altered to his prejudice.

This was very clearly pointed out in the thoroughly considered case of *Clough v. London and North Western R.W. Co.* (1871), L.R. 7 Ex. 26. In that case it appeared that the London Pianoforte Company, who were admitted to be the real defendants, had been induced by the fraud of one Adams to make a sale to him of nine pianos which were to be delivered to the London and North Western Railway Company, by whom they were to be forwarded to Liverpool and delivered to the plaintiff. The London Pianoforte Company received from

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Adams the sum of £68 and an acceptance for the balance of the price of the pianos. The London and North Western Railway Company carried the pianos to Liverpool, and, Adams having become insolvent, there was an attempt by the London Pianoforte Company to stop the pianos *in transitu*. Ultimately the pianos were returned by the railway company to the piano company, the latter agreeing to indemnify the former, and action was brought by the plaintiff against the railway company in trover or for recovery of the value of the pianos. The London Pianoforte Co. had not before action returned the £68 and the acceptance to Adams, nor offered to do so, and one question before the Court was as to the effect of the failure to do so. In discussing the question the Court says (p. 34): "And, consequently, we agree with what seems to be the opinion of all the Judges below, that if it can be shewn that the London Pianoforte Company have at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, their election has been determined forever. But we differ from them in this, that we think the party defrauded may keep the question open so long as he does nothing to affirm the contract." Then, after giving some illustrations and citing some authorities, they continue (p. 35): "In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind." And again (p. 35): "Neither can we see the principle or discover the authority for saying that it is necessary that there should be a declaration of his intention to rescind prior to the plea. It seems to us clear, on principle, that a statement in a plea by the party from whom the property passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination of his election to avoid the transaction as could well be made."

It is therefore a question of fact in every case of this kind whether the party defrauded has after discovery of the fraud elected not to avoid the transaction. And unless the other party can shew that either by unequivocal acts or express words there has been an election not to avoid the transaction, the question of its invalidity is open for trial.

Now in *Hewson v. Macdonald* (*supra*) the plaintiff was held to be concluded because the facts shewed a distinct election by him to retain the release and not to disaffirm it. It was held that under the circumstances the order appealed from, which permitted the defendant to amend his pleadings by setting up the release, and allowed the plaintiff to set up by way of reply that it was obtained by fraud, should not have been made, when it was plainly apparent that the plaintiff was not entitled to enter upon a trial of that issue. No such state of facts has been shewn to exist in this case. As the case of *Barnes v. Richards* (*supra*) appears to shew, the mere retention or non-restoration of the money may not in itself prove a bar to the claim to set aside the release.

Upon the plaintiff's examination in chief no reference was made to the release. On cross-examination the defendants' counsel drew from her the admission that she signed the release and that she had not returned the money. It was then open to the defendants to object to her entering into the circumstances under which she was induced to sign it. But she was allowed without objection to give her testimony with regard to it, to cross-examine the defendants' witness King, and to adduce evidence in reply with respect to it. And the point that she was precluded on that ground from disputing the validity of the release was not raised before the learned trial Judge. Neither as a matter of pleading nor of substance was she treated as debarred, by reason of not having restored or offered to restore the money, from impeaching the transaction. And there has been no finding that she elected not to disaffirm it. The release having been declared invalid for reasons which appear to us to be satisfactory, she ought not now to be deprived of the benefit of that finding merely because before action she had not returned or offered to return the money.

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But it has not been found that an actual premeditated fraud was practised on the plaintiff, in which case there would be no obligation to restore money paid in pursuance of it. The plaintiff, therefore, having been relieved by the Divisional Court as respects the release, should have been required to return or otherwise make good the money paid to or on her account. If the judgment for \$750 in her favour had remained, it would have been proper to reduce it by the amount so paid. But, as the judgment for damages no longer stands, she should now be allowed to bring the amount into Court ready to be paid to the defendants in the event of her failing to obtain a verdict for damages on the trial directed by the Divisional Court. If she obtains a verdict the amount paid to her may be deducted, and the sum in Court will be paid out to her. Any amendments to the pleadings necessary to set forth the plaintiff's willingness to make good the money paid by the defendants should be made.

Subject to these directions the appeal is dismissed with costs.

The cross-appeal is also dismissed with costs.

T. T. R.

[IN THE COURT OF APPEAL.]

CITY OF HAMILTON V. HAMILTON STREET R. W. CO. (No. 1).

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Street Railways—Contract with Municipality—Payment of Percentage on Gross Receipts—Intra Vires—Meaning of “Gross Receipts.”

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Held, affirming the judgment of MEREDITH, J., 8 O.L.R. 455, that the agreement between the parties for the payment by the defendants to the plaintiffs of a certain percentage of the defendants' gross receipts was *intra vires* of both; that the term “gross receipts” included fares paid by passengers outside the limits of the city of Hamilton; and that the term also included moneys received from the sale of tickets which might possibly not be used in payment of fares.

APPEAL by the defendants from the judgment of Meredith, J., 8 O.L.R. 455, in favour of the plaintiffs in an action upon a covenant contained in an agreement, under seal, made between the parties, dated the 26th March, 1892, whereby the defendants agreed to pay to the plaintiffs a certain proportion of the defendants' “gross receipts;” and dismissing the defendants' counterclaim for sums alleged to have been overpaid to the plaintiffs. The facts are stated in the former report and in the judgments delivered in the Court of Appeal.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 20th and 21st February, 1905.

E. D. Armour, K. C., and *G. H. Levy*, for the defendants, appellants. The defendants' Act of incorporation, 36 Vict. ch. 100 (O.), gives them power to construct and operate a railway not only in Hamilton, but in the adjoining municipalities. By sec. 7, each of the municipalities is empowered to make such agreements as it thinks fit for the particular section of the railway which is within its boundaries; and sec. 15 gives the specific matters upon which the agreement may be made. Section 7 is general, and sec. 15 is specific. Both parties are creations of the statute law, and their powers must be found in the enactments incorporating them: Neither sec. 7 nor sec. 15 gives either of the parties the right to enter into an agreement such as that in question. There is no clause in the defendants'

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Act allowing them to enter into an agreement with the plaintiffs regarding an annual license: *Corporation of Whitby v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 480. The agreement, in so far as it provides for a mileage rate and percentage upon the gross receipts, is invalid and beyond the powers of both parties or either of them. Whatever may be the rights as to past transactions, the defendants ought not to be held to a void agreement in the future. See *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H. L. 653; *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473; *Wenlock v. River Dee Co.* (1885-7), 36 Ch. D. 674, 10 App. Cas. 354. It is, at all events, beyond the powers of the plaintiffs to enter into an agreement in regard to the gross receipts of fares collected outside of the city. It is evident that each municipality was intended by the defendants' Act to be authorized to make agreements affecting the operation of the railway within its own limits only. Consequently it could make no agreement as to matters occurring outside its geographical limits. An *ultra vires* agreement cannot be ratified, and payments made cannot have the effect of ratification. Neither sec. 7 nor sec. 15 of the defendants' Act gives the plaintiffs any right to control the defendants' fares; that right is expressly given by sec. 8 to the directors of the defendants, and the right so given could not be taken away by agreement. If the agreement is valid, it is specifically limited to things occurring within the city. It originated in, and in fact is, a by-law of the plaintiffs, which was intended to apply to things occurring within the city, and its acceptance by the defendants did not extend its meaning, its operation, or its effect. The contents of the by-law indicate that its operation was intended to be confined to Hamilton alone: see secs. 23 and 24 of the by-law. However general the terms in which a contract is expressed, they extend only to the things as to which the parties intended to contract. As to tickets sold but not used: there is no "receipt" of a fare, within the meaning of the contract, until the passenger has paid "on entering the car." Tickets bought may never be used, but may be returned and the money paid for them refunded, in which case there would be no received fares. The fares spoken of in the contract are fares paid on the car for

passage. It is only when the ticket is handed in as a fare that the fare becomes assessable for a percentage.

F. MacKelcan, K. C., and *W. R. Riddell*, K. C., for the plaintiffs. The defendants' Act did not give them power to construct a railway upon the streets of Hamilton or adjoining municipalities, but only upon and along such streets as the defendants might be authorized to pass along, under and subject to any agreement to be made between the councils of the city and the other municipalities and the defendants, and under and subject to any by-laws of the city and other municipalities. If the terms contained in the plaintiffs' by-law No. 624 had not been agreed to by the defendants, the latter could not have built their railway. The grant to the defendants of the right was one of great value, and payment must be made for it. The defendants' Act imposed no restriction as to the terms or compensation. The gross receipts upon which the percentage was stipulated for, were the gross receipts which came to the head office of the company from the whole of its business: *City of Kingston v. Canada Life Assurance Co.* (1890), 19 O.R. 453. The practice of charging street railway companies for the privilege of using the streets is well established and sanctioned by the Ontario Legislature and other legislative bodies: see 55 Vict. ch. 99 (O.); 27 Am. & Eng. Encyc. of Law, 2nd ed., pp. 21, 22. Assuming that the comprehensive words used in sec. 7 of the defendants' Act do not expressly authorize the making of the agreement, they do not forbid it, and the contract is not *ultra vires*: *Scottish North-Eastern R.W. Co. v. Stewart* (1859), 3 Macq. 382, 415; *Taylor v. Chichester and Midhurst R.W. Co.* (1867), L. R. 2 Ex. 326, 375, 393, (1870), L. R. 4 H. L. 628; *South Yorkshire R.W. Co. v. Great Northern R.W. Co.* (1853), 9 Ex. 55, 84; *Bateman v. Mayor, etc., of Ashton-under-Lyne* (1858), 3 H. & N. 323, 335; Brice on *Ultra Vires*, 3rd ed., pp. 50-52; *Attorney-General v. Great Eastern R.W. Co.* (1880), 5 App. Cas. 473, 478 (referring to *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653); *Shrewsbury and Birmingham R.W. Co. v. North-Western R.W. Co.* (1857), 6 H. L. Cas. 113. If the contract were unauthorized, it would be voidable only and not void, and the defendants elected to act on it and take the benefit of it:

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McDiarmid v. Hughes (1888), 16 O.R. 570; Maxwell on Statutes, 3rd ed., pp. 293-295. Having received the benefits of the agreement, the defendants are estopped: *Daniels v. Tearney* (1880), 102 U.S. 415, 421; *People v. Suburban R. Co.* (1899), 178 Ill. 594; Bigelow on Estoppel, 5th ed., pp. 571-575; *County of Haldimand v. Hamilton and North-Western R.W. Co.* (1877), 27 C.P. 228; *Hardy Lumber Co. v. Pickeral River Improvement Co.* (1898), 29 S.C.R. 211, 214; *Bernardin v. Municipality of North Dufferin* (1891), 19 S.C.R. 581. Upon the construction of the contract *City of Montreal v. Montreal Street R.W. Co.* (1904), 34 S.C.R. 459, is an authority, the cases being similar. There is no foundation for the contention that the percentage should not be charged upon sums received for tickets sold and not yet used. All moneys received for tickets sold are part of the "gross receipts." It has never been suggested that the defendants bought back tickets sold. If they did so in any case, the amount expended in buying back the tickets might perhaps be properly deducted from their gross receipts. All payments made by the defendants to the plaintiffs were based upon the statements and returns made by the defendants of the receipts, and were paid voluntarily and not under compulsion: *Cushen v. City of Hamilton* (1902), 4 O.L.R. 265. It is argued that the right to control the fares is expressly given to the defendants' directors; but the provisions in the city by-law relating to fares only came into effect when the defendants accepted the by-law and agreed to its terms.

Armour, in reply.

June 29. Moss, C.J.O.:—This is an appeal by the defendants from a judgment of Meredith, J., delivered after trial of the action without a jury, and now reported in 8 O.L.R. 455. The nature of the action and the questions involved are there fully stated.

By the agreement between the parties the defendants covenanted, amongst other things, to pay the plaintiffs quarterly during each year until the 22nd December, 1913, a certain percentage, according to a graduated scale, of the defendants' "gross receipts." And as presented by the plead-

ings the question was whether fares collected or received by the defendants from passengers outside the limits of the city and sums received from passenger tickets sold by the defendants but not used or presented by the holders, formed part of the gross receipts for which the defendants were liable to account to the plaintiffs. During a considerable portion of the time between the execution of the agreement—and even after the construction of their line into the township of Barton—and the commencement of the action, the defendants in computing the amount of the gross receipts reckoned these sums as part thereof and made payment on that footing. Later they took the position that these sums should be excluded. So far as appears, they did not pretend that the covenant to pay was not binding upon them. They merely disputed the quantum. But at the trial and again on the appeal they contended that they were not liable because the covenant was one beyond the power of the parties to make or enter into. The ground upon which this somewhat belated contention is based is, that neither under the legislation incorporating or otherwise affecting the defendants, nor under their general corporate powers and authorities, have either the defendants or plaintiffs the capacity to agree the one to pay or the other to receive any portion of the receipts derived from fares as a consideration for the privileges granted. It is, of course, beyond dispute that the defendants are not entitled to occupy or use any of the streets of the city of Hamilton without the plaintiffs' authority. The defendants' Act of incorporation, 36 Vict. ch. 100 (O.), only enables them to construct and operate their railway upon and along such streets and highways as they may be authorized to pass along, under and subject to any agreement to be made and under and subject to any by-laws made in pursuance thereof (sec. 7). And (*inter alia*) the plaintiffs and defendants are further authorized to make and enter into any agreement or covenant relating to the construction of the railway (sec. 15). These provisions, taken with the other parts of the same sections, embrace more than the mere physical construction of the railway. They are wide enough to include authority to the defendants to give reasonable consideration for the

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authority to use, occupy, and pass along the streets and highways within the plaintiffs' jurisdiction. The authority to make and enter into an agreement confers an authority to agree upon a consideration. And there is nothing expressly or by inference prohibiting a money consideration. The fact that part of the money consideration to be paid is to be measured by the standard of the receipts—gross or net—coming to the defendants' coffers, can make no difference. The obligation is to pay so much money to be ascertained in a certain way. And there appears to be no more reason for saying that the defendants have not capacity to agree to pay for this particular service than there would be for saying they have no power to pay for any other service connected with the construction, maintenance, and operation of their railway. Neither does there appear to be any want of capacity on the part of the plaintiffs to require and when agreed upon to accept payment of a money consideration for the privileges they are authorized but not obligated to grant.

The reasonableness of the terms may be assumed from the fact that they were accepted by the defendants, whose directors were, it must be taken for granted, fully alive to their company's interests. And there is not the least suggestion that in making and entering into the agreement either side was actuated or guided by other than the strongest desire to advance the interests of those they represented. The disposition of the moneys when received by the plaintiffs may be, and doubtless is, a matter of material concern to the ratepayers, but that can scarcely be considered as affecting the corporate capacity of the plaintiffs to enter into the agreement.

The fixing of the scale of fares for the term of the agreement is not unreasonable, nor beyond the scope of the directors' powers. Section 8 of the Act gives the directors full powers to make by-laws, and among the enumerated subjects to be dealt with is included "the fares to be received from persons to be transported over the railway or any part thereof."

The same section also empowers them to do all things that may be necessary to carry out the objects and the exercise of any powers incident to the company.

It is manifest that one very material object of the company was the securing of the right to occupy and use the highways of the city with their tracks and cars for an extended period. A short or uncertain period would have been of no use or advantage to the company. And if for the purpose of obtaining an extended period it was deemed a necessary term that the scale of fares should be fixed during the period, it was competent for the directors, in the exercise of the powers incident to the company, to deal with the fares as they did. And in the face of the instruments executed by and under the seal of the defendants, and of their acts under and in pursuance of the agreement, and of its recognition in the subsequent legislation, the defendants should be held bound, unless it very clearly appears that what has been done is beyond the powers not only of the directors but of the company.

The next question is as to the scope of the words "gross receipts." The learned trial Judge has pointed out that, though these words are of wide significance, they must necessarily be restricted so as to confine them to receipts partaking of the nature of income as contrasted with the capital account of a business or undertaking.

Dealing with them in that sense, it is obvious that what was contemplated as the main source from which receipts were to be derived was the working of the railway under and upon the terms of the agreement, and that would properly include fares for the transport of passengers over the streets and highways of the city, no matter how or by what means brought to the defendants' line of railway. It can make no difference when or where the service rendered was paid for. It is a receipt in respect of service rendered under the agreement, and must be counted as part of the defendants' receipts, for which the defendants must account to the plaintiffs under the terms of the agreement. This does not embrace receipts from fares received in respect of services rendered entirely outside of the city. But the amount of these is so trifling as not to affect the fate of the appeal, especially as the plaintiffs' counsel expressed his clients' willingness to forego any claim as to them.

The third question in the case presents no difficulty. There appears to be no principle on which sums received for tickets

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sold but yet outstanding can be segregated from the other receipts in respect of fares. They form part of the income of the company, and it is only in the improbable event of the defendants refusing to honour them when presented by the holders that there would be any ground for the purchaser seeking to reclaim his money.

The appeal should be dismissed.

OSLER, J. A.:—The defendants were incorporated by 26 Vict. (1873) ch. 100, and by sec. 7 were authorized to construct and operate a street railway along streets and highways of the city and of any adjoining municipalities which the company might be authorized to pass along, under and subject to any agreement which might be made between them, and to carry passengers and freight upon the same by such motive power as they might be authorized by by-law to use. By sec. 8 the directors were authorized to make by-laws, *inter alia*, entering into arrangements and contracts with the city and other municipalities: for fixing passenger fares, the maximum fare not to exceed six cents for any distance of three miles and under, and one cent per mile in addition for all distances over three miles. By secs. 15 and 16 the council of the city and of adjoining municipalities and the company were authorized to enter into any agreement or consent relating to the construction of the railway; the paving, etc., of the streets; construction, etc., of sewers; the location of the railway; the particular streets along which it should be laid; pattern of rail, time and manner of commencement, proceeding with and completion of work of construction; and generally for safety and convenience of passengers, etc.: and the city and other municipalities were authorized to pass by-laws for giving effect to any such agreements.

The railway was at first constructed and was for many years operated as a horse railway.

In the year 1892 the company desired to convert the railway into an electric railway, and on the 26th March of that year a by-law was passed by the plaintiffs reciting the Act and the former by-laws of the city, and that it had been agreed between the company and the city that these by-laws and the

existing agreements between them should be terminated and that a new by-law and agreement should be substituted therefor.

Among the numerous clauses of the by-law are: 1. Grant of the plaintiffs' assent to construct the railway as an electric railway upon and along the city streets specified in the by-law, upon and subject to the conditions and agreements afterwards set forth therein.

Clause 19: "The following specifications regulating the running of the railway shall be observed by the company," *inter alia* the company may charge and collect from every person on entering any of their cars for riding any distance on their railway on the same continuous route a sum not exceeding five cents: the company to grant transfers to the extent specified; to issue workmen's tickets at eight for twenty-five cents, good during certain specified hours of the day; and to carry children between five and twelve years of age for a cash fare of three cents or give ten children's tickets for twenty-five cents; and to sell tickets to any persons desiring the same at a rate not exceeding twenty-five cents for six tickets for fare to any point within the city limits.

Clause 23 provides that the company shall pay the city a certain specified mileage or track allowance; and clause 24, that they shall also pay "quarterly during each year the following percentages on their gross receipts;" setting forth a rising series of percentages from $6\frac{1}{2}$ on the total gross receipts up to \$125,000, to 8 per cent. on the total gross receipts when "the receipts reach \$200,000;" the company "to pay not less than \$10,000 for the first year and not less than \$12,000 in any subsequent year as their total mileage and percentage of receipts."

On the same day the plaintiffs and defendants entered into a formal agreement, reciting the by-law and the incorporating Act, whereby the defendants accepted the by-law and agreed with the plaintiffs to pay them the sums mentioned in the by-law and to perform, observe, and comply with all the agreements, obligations, terms, and conditions therein contained, and the plaintiffs agreed to accept and thereby accepted the agreement and declared it to be the agreement required by the

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by-law to be executed by the company, and that the by-law was, therefore, in full force and effect.

In the following session of the Provincial Legislature an Act was passed, 56 Vict. ch. 90, on the application of the defendants, setting forth that they had converted their railway into an electric street railway and had prayed that their powers might be extended and their Act of incorporation amended as thereafter set forth. Among the powers they obtained was power to change the number of directors, power to increase capital stock, and by sec. 4 to issue bonds, debentures, etc. The 4th sub-section of this section provides that the company may secure the bonds and debentures by a mortgage and charge the same upon the whole of the undertaking, property, assets, rents and revenues, rights, powers, and franchise of the company, present and future, including the rights, powers, and franchise under by-law 624 of the plaintiffs and the agreement made pursuant thereto, which are set out in a schedule to the Act, and, also under by-law 337 of the township of Barton, dated the 6th February, 1893, and the agreement of the same date made pursuant thereto, "but such rents and revenues shall be subject in the first instance to the working expenses of the undertaking."

Section 5 provides that the bond issue shall not exceed \$25,000 per mile of single track, and also that it shall not interfere with the plaintiffs' rights to assume the ownership of the railway and its property in connection with the works thereof in pursuance of and under the terms of the said by-law and agreement.

By the by-law of the township of Barton passed on the 6th February, 1893, referred to in the Act, the defendants were authorized to construct an electric railway from a point in easterly limits of the city along the course and for the distance specified and to charge a fare of five cents, payable on entering the car, from any part of the township over which the railway extends to any other place on their railway in the township or in the city of Hamilton.

The defendants extended their line from the terminus of one of their tracks in Hamilton for a distance of about two and

a half miles into the township of Barton in pursuance of the last mentioned by-law.

They paid all the percentages mentioned in by-law 624 upon their gross receipts up to the end of the year 1894, without making any deduction in respect of fares received outside the city limits, and paid on a similar basis the percentages upon the gross receipts for the years 1895, 1896, 1897, and 1898. Passengers were carried during these years from Barton into Hamilton and from Hamilton into Barton for one fare. Sometimes cars were operated and passengers carried within the township of Barton alone.

In 1900 the defendants deducted from total gross receipts all fares received outside the city of Hamilton.

The defendants contend :

(1) That the agreement between the city and themselves is *ultra vires*, so far as it confers a right upon the former to exact and an obligation upon the latter to pay a percentage upon the gross receipts of the company.

(2) That, even if not *ultra vires*, yet fares received by the defendants in Barton are not to be computed in ascertaining the gross receipts upon which percentages are payable, whether such fares are paid for a journey entirely within the township or for one commencing in the township and ending in the city.

(3) That moneys received from the sale of tickets in gross, as it may be called, which have not been actually used, are not part of the gross receipts, which should be confined to fares actually paid, or tickets representing them, actually taken on the cars.

As to the first point I am of opinion that the agreement is not *ultra vires*. Although the defendants derived their corporate being from the Legislature, it was one ineffectual as a shadow until the plaintiffs breathed into it the breath of life. The conditions on which the franchise should come into existence, the extent to which it should be enjoyed, and the period of its duration, were committed by the Legislature to the contract of the plaintiffs, by the plain language of sec. 7 of the incorporating Act, which enacted that the exercise of the defendants' corporate powers should be restricted to such of the streets as they should be authorized to pass along, under and

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subject to any agreement to be made between the city and themselves and under and subject to any by-law made in pursuance thereof. The power of the city is not limited to merely giving authority to use the streets. There is power to make an agreement; power to impose terms and conditions on which such authority shall be given; and this is the precise ground on which the present case differs from that of *Corporation of Whitby v. Grand Trunk R. W. Co.*, 1 O.L.R. 480. I see no reason for cutting down the wide language of the section. If it is large enough to warrant the parties in agreeing to the limitation of the period of the franchise and to the acquisition by the city of the ownership of the railway at the expiration of the term (which has not been denied), it is *a fortiori* that in the interest of their ratepayers the city were at liberty to exact from a private commercial corporation some reasonable compensation for the right to use their streets. There is nothing in the Act which expressly or by necessary implication prohibits a contract of that nature. The language of sec. 15 is not restrictive or explanatory of that of sec. 7. The two sections are not associated and deal with different subjects. The earlier relates to the conditions on which the franchise shall come into being: the later deals with matters of detail and other matters consequent upon and germane to it. Volume 27 of the *Am. & Eng. Encyc. of Law*, pp. 21, 22, and *Nellis on Street Surface Railroads*, p. 18, may be referred to.

I do not consider it necessary to resort to the Act of 1893 in aid of or as confirming the by-law and agreement, although sec. 4, sub-sec. 4, and sec. 5, especially the latter, look in that direction. I think they may well stand upon the Act of 1873 alone. I refer to *City of Montreal v. Montreal Street R. W. Co.*, 34 S.C.R. 459, merely to shew that it has not been overlooked. It is, if anything, in favour of the plaintiffs, but the language of the incorporating Acts and the surrounding circumstances are different, and it is therefore not necessary to invoke it in aid of our judgment.

The remaining defences are substantially disposed of by the answer to be given to the question, what is meant by the total "gross receipts" upon which the percentages are payable. The expression, no doubt, must receive some limitation, as no one

could suppose it would include receipts of moneys derived from the sale of bonds or debentures or anything of that kind. I think it meant the earnings of the company from the business they were authorized to carry on.

It is unnecessary to decide whether it would include fares paid for travel in the township of Barton alone, as these amounted to a very trifling sum, and the plaintiffs did not desire to press for them.

Then as to receipts from tickets sold to be used on the highway. This is merely one method in which the company's business is done, obligatory no doubt as regards workmen's and children's tickets. The percentage is not expressed to be upon fares paid, but upon total gross receipts, and if the company are, as it were, paid in advance, I am unable to perceive how such payments are less part of their gross receipts than are moneys received from fares actually paid in cash on the car, more especially as having once sold the tickets there is no provision for recouping the purchaser if he loses or destroys them or does not use them.

For these reasons the judgment should be affirmed.

MACLAREN, J.A.:—The Hamilton Street Railway Company was incorporated by the Ontario statute of 1873, 36 Vict. ch. 100. By sec. 7 it was authorized to construct and operate a railway along such streets and highways of the city of Hamilton and of any of the adjoining municipalities as the company might be authorized to pass along, under and subject to any agreement to be made between the council of the said city and of said municipalities respectively, and the said company, and under and subject to any by-laws of the corporation of the said city and municipalities respectively made in pursuance thereof.

By sec. 15 of the Act the councils of the city and adjoining municipalities were authorized to enter into agreements regarding the location and construction of the railway, etc., and by sec. 16 they were authorized to pass rules and by-laws for the purpose of carrying into effect such agreements.

On the 26th March, 1892, the council of the city passed a by-law, No. 624, giving its consent on certain terms to the

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construction of a railway on certain named streets of the city' and by clause 24 it was provided that the company should pay to the city corporation quarterly during each year certain percentages on their gross receipts, as well as a certain amount per mile on each mile of track within the city.

By an agreement, duly executed by both parties on the same day, the company accepted the by-law and agreed to pay the city the sums mentioned and to comply with the terms of the by-law.

On the 6th February, 1893, the township of Barton, adjoining the city, passed a by-law allowing the company, on certain terms, to extend its railway from the city along certain highways of the township, and to charge a certain mileage for the privilege. This was accepted by the company, and the railway was extended into the township.

The first claim of the company is, that this is a void transaction, and that it was beyond the power of the city to stipulate for a mileage rate and a percentage of the gross receipts of the company, not being authorized to do so by the statute or by the municipal law.

The learned trial Judge held that whatever might have been held if this objection had been taken at the time of the agreement or shortly after, the fact that the agreement had been acted upon by both parties for upwards of twelve years, and that it had been recognized in a measure in a subsequent Act respecting the defendants, were sufficient reasons for not now giving effect to this contention. This objection was not pressed very strongly upon us, and I do not think it should now be allowed to prevail.

The principal point in the appeal is as to the meaning of the words "gross receipts." The company claims that they mean only such fares as are actually collected within the city, and that it was the intention of the parties to restrict the agreement as to the right of operation, etc., to the city alone.

The trial Judge held that the words "gross receipts" were intended to include all traffic receipts in connection with the defendants' railway system operated in the city of Hamilton, and that the short extensions of the railway beyond the city limits were really part of that system, as much as if the

objective points of such extensions had happened to have been within instead of without the city.

My first impression was, that there might be something in the contention of the company that the city was not entitled to a percentage of the fares paid and collected outside of the city, especially with regard to those paid by persons whose journey was wholly outside the city limits. It was stated by both parties that these latter would amount to a mere trifle, the amount in dispute being made up almost entirely of fares collected from persons going to and returning from popular resorts a short distance outside the city limits.

We were referred to a number of decisions in connection with agreements bearing more or less resemblance to the one now in question. In endeavouring to construe this agreement, however, I do not see that we can obtain much assistance from any of these. It must be construed according to its particular language and with respect to the particular circumstances under which it was made.

As I have said, my first impression was, that "gross receipts" might be restricted to fares collected or paid within the city, as a municipal corporation might be presumed to be contracting with reference to what would take place within its own limits.

A close examination of the agreement, however, has led me to the conclusion that it cannot properly be so restricted in this case. It was quite competent for the company to agree to pay to the city a percentage upon the total amount of its fares, and I think it has so agreed in adopting the wide language used by the parties.

The fixing of such a percentage was merely a method adopted by the parties of determining the amount which the company should pay to the city for the valuable privileges and franchise which it had acquired. This the parties agreed should be determined in part by the payment of a percentage of the receipts, so that with the ability of the company to pay, and the increase in the value of the privileges conceded, the amount of the payments should automatically increase. This would appear to be a reasonable agreement; but with its wisdom or its unwisdom we have nothing to do. I cannot see

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how by any proper construction of the agreement itself it can be restricted or cut down as the appellants desire.

There is also a small point as to whether the moneys received by the company from the actual sales of tickets should form the basis of the "gross receipts" or whether it should be the actual fares paid by cash or tickets upon the cars. On this point I think the learned trial Judge was right also in holding that the moneys actually received by the company, whether for tickets or as fares, should form the basis in estimating "gross receipts." Even if tickets should be lost or destroyed, or even if the company should redeem unused tickets (and it was admitted that these were scarcely worthy of mention), I am of opinion that the money received on their sale properly forms a part of, and should be included in, the "gross receipts" on which the percentage is to be reckoned.

Such would have been my opinion even if the parties themselves had not construed and acted upon the agreement. The fact that the company up to the year 1899 made its calculations and payments on the basis laid down in the judgment appealed from is not without significance.

On the whole I am of opinion that the judgment of the trial Judge is correct and should be affirmed.

MACLENNAN and GARROW, J.J.A., concurred.

T. T. R.

[DIVISIONAL COURT.]

RE BOLSTER.

D. C.
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July 6.

Will—Construction—Direction to Pay Debts and Testamentary Expenses—Succession Duties—Specific Legacies—Exoneration at Expense of Residuary Legatees.

A testator made numerous specific pecuniary bequests, and gave the residue of his estate to persons other than the specific legatees. He directed his executors to pay his just debts and funeral and testamentary expenses:—*Held*, that succession duties do not come within the description either of a debt or part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees.

Kennedy v. Protestant Orphans' Home (1894), 25 O.R. 235, *Manning v. Robinson* (1898), 29 O.R. 483, and *Re Holland* (1902), 3 O.L.R. 406, approved. Decision of TEETZEL, J., affirmed.

APPEAL by Sarah Bolster, a legatee under the will of Lancelot Bolster, deceased, from an order of TEETZEL, J., in a proceeding under Rule 938.

The testator by his will gave numerous specific legacies, and gave the residue of his estate to persons other than the specific legatees. He directed his executors to pay his just debts and funeral and testamentary expenses.

The contention raised by the appellant, who was one of the specific legatees, was, that under the direction in the will that the executors were to pay the debts and funeral and testamentary expenses, they were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees.

TEETZEL, J., decided against this contention, and the present appeal was then brought.

The appeal was heard on the 19th June, 1905, by a Divisional Court, composed of FALCONBRIDGE, C.J.K.B., STREET and MAGEE, JJ.

W. T. J. Lee, for Sarah Bolster and others in the same interest. Reading the whole will, the succession duty is a debt which the executors are bound to pay: R.S.O. 1897, ch. 24, sec. 5; *Attorney-General v. Newman* (1899), 31 O.R. 340,

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(1901), 1 O.L.R. 511; *Wishart v. Lord Advocate* (1880), 8 Rett. 74; *Hanson's Death Duties*, 4th ed., p. 147; sec. 7 of the *Devolution of Estates Act*, R.S.O. 1897, ch. 127; *Re Holland* (1902), 3 O.L.R. 406; *In re Clemow*, [1900] 2 Ch. 182; *In re Fearnside's*, [1903] 1 Ch. 250; *In re Sharman*, [1901] W.N. 123; *Sharp v. Lush* (1879), 10 Ch. D. 468; *In re Webber*, [1896] 1 Ch. 914; *In re Treasure*, [1900] 2 Ch. 648.

W. E. Middleton, for Minnie Dowdall, referred to *Blackwood v. The Queen* (1882), 8 App. Cas. 82, 90.

Frank Ford, for the infants, the residuary legatees, cited *Soward's Estate Duty*, 4th ed., p. 172; *Attorney-General v. Cameron* (1896), 27 O.R. 380, (1897), 28 O.R. 571, (1899), 26 A.R. 103; *Kennedy v. Protestant Orphans' Home* (1894), 25 O.R. 235; *Manning v. Robinson* (1898), 29 O.R. 483.

W. B. Raymond, for the executors.

Lee, in reply, cited *In re Prince*, [1898] 2 Ch. 225.

July 6. The judgment of the Court was delivered by STREET, J.:—The duty of an executor is to pay the debts and funeral and testamentary expenses without any special direction to that effect in the will; a special direction to do so does not, therefore, in any way alter his duty, unless a particular fund is pointed out in the direction, from which these outgoings are to be paid to the exoneration of the other portions of the estate. In the absence of any direction in the will with regard to them, they are paid out of the general residue of the estate.

The contention of the appellant is that the succession duty required to be paid by R.S.O. 1897, ch. 24, is either a debt or a testamentary expense, and that the special direction to the executors here to pay debts and testamentary expenses has the effect of charging the succession duty payable in respect of the whole estate upon the residue, to the exoneration of the legatees. The result of this argument, if it is sustained, must logically be that in every case the succession duty is payable out of the residue and not out of the specific legacies bequeathed by the testator, unless a provision to the contrary is contained in the will. But to hold this would, it seems to me, be to reverse the general rule laid down by the 4th section of the Act, which requires the executor to deduct the amount of the duty upon

each legacy subject to duty before handing it over to the legatee. That section seems to intend that unless a legacy, whether specific or residuary, is specially exonerated, it shall bear the duty payable in respect of it, not, as contended by the appellant, that the residuary legatees shall in all cases bear not only their own duty, but also that payable in respect of specific legacies.

But, in my opinion, the Succession Duty Act does not come within the description either of a debt or a part of the testamentary expenses. It cannot be a debt of the testator, for it does not arise as a liability of the testator until after his death. It is not, in my opinion, a part of the testamentary expenses, because it is not payable upon the grant of probate. It is true the executor is required, before taking probate, to give a bond that he will pay the duty which may be found chargeable in respect of the property coming to his hands, but it is not payable until 18 months from the testator's death, with power to a Judge to extend the time for payment.

The decisions which have been referred to upon the Acts of the Imperial Parliament imposing estate, settlement, and succession duties, do not seem to control the interpretation of our Succession Duties Act, because of the entire lack of similarity between the provisions of those Acts and ours.

The contention of the appellant here has already been passed upon and overruled by the decisions of Armour, C.J., in *Manning v. Robinson*, 29 O.R. 483, and of the present Chief Justice of Ontario in *Re Holland*, 3 O.L.R. 406, and of MacMahon, J., in *Kennedy v. Protestant Orphans' Home*, 25 O.R. 235. In my opinion, these cases were rightly decided, and the appeal should be dismissed with costs.

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[IN THE COURT OF APPEAL.]

C.A. CITY OF HAMILTON V. HAMILTON STREET R.W. CO. (No. 2).

1905

June 29.

Street Railways—Contract with Municipality—Intra Vires—"Workmen's Tickets"—Action to Enforce Contract—Parties—Attorney-General—Specific Performance—Injunction.

Held, affirming the judgment of Street, J., 8 O.L.R. 642, that the agreement of which the enforcement was sought in this action was *intra vires*; that by the terms of the agreement the defendants were bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets," and to receive them from all persons tendering them as fares during certain specified hours of the day; that the plaintiffs could maintain the action without the aid of the Attorney-General; and that performance of the contract could be enforced by the Court by injunction.

City of Kingston v. Kingston, etc., Electric R.W. Co. (1898), 25 A.R. 462, distinguished.

APPEAL by the defendants from the judgment of Street, J., 8 O.L.R. 642, in favour of the plaintiffs in an action for a mandamus or a mandatory injunction to compel the defendants to sell on their cars tickets called "workmen's tickets" good for the payment of fares at certain hours of the day.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 22nd February, 1905.

E. D. Armour, K.C., and *G. H. Levy*, for the defendants, appellants. The plaintiffs have no right to maintain this action, because they do not represent the public, who alone are interested in the subject matter; the action is not brought with respect to any consideration moving towards the plaintiffs as a corporation, and no relief is granted to them as a corporation. The Attorney-General alone has the right to sue, if any action lies: *Johnston v. Consumers' Gas Co.*, [1898] A.C. 447; *Hope v. Hamilton Park Commissioners* (1901), 1 O.L.R. 477. The statute 63 Vict. ch. 35 (O.) does not authorize the plaintiffs to maintain the action. That statute applies only to contracts which have been created, enacted, or validated by statute. Though the contract in question is referred to in 56 Vict. ch. 90 (O.), it is not validated: see 56 Vict. ch. 91, secs. 1, 3 (O.), validating the Kingston agreement as to fares: *Kent Coast R.W. Co. v. London, Chatham, and Dover R.W. Co.* (1868), L.R. 3 Ch. 656, 667, 670; *Edinburgh Street Tramways Co. v.*

Black (1873), 2 H. L.Sc. 336, 347; *The Queen v. Midland R.W. Co.* (1887), 19 Q.B.D. 540, 548; *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352; *Bishop Auckland Industrial Co-operative Society v. Butterknowle Colliery Co.*, [1904] 2 Ch. 419, 425. The statute 63 Vict. ch. 35 applies only where obligations arise in favour of the inhabitants of the corporation, or some portion thereof; otherwise there is an obligation (if at all) to all the public, whether inhabitants of Hamilton or not. Specific performance of such a contract cannot be adjudged: *City of Kingston v. Kingston, etc., Electric R. W. Co.* (1897-8), 28 O.R. 399, 25 A.R. 462; *Bickford v. Town of Chatham* (1889), 16 S.C.R. 235, 252, 253, 257; *Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116, 123; *Blackett v. Bates* (1865), L.R. 1 Ch. 117, 124, 125; *Phipps v. Jackson* (1887), 56 L.J.N.S. Ch. 550; *Nickels v. Hancock* (1855), 7 DeG. M. & G. 300, 326; *Low v. Innes* (1864), 4 DeG. J. & S. 286, 295. The directors have the power to fix the fares, by sec. 8 of the Act. The by-law and agreement in so far as they affect fares are *ultra vires*; and certainly in so far as they affect to discriminate in fares between certain classes: *Regina v. Pipe* (1882), 1 O.R. 43; *Jonas v. Gilbert* (1881), 5 S.C.R. 356; *North-West Electric Co. v. Walsh* (1898), 29 S.C.R. 33. It is significant, comparing the defendants' incorporating Act with other charters, that there is no clause permitting an agreement in regard to the fares to be paid: see *Corporation of Whitby v. Grand Trunk R.W. Co.* (1901), 1 O.L.R. 480, 485, 486. The defendants ought not to be held to a void agreement in the future, and the Court ought not to enforce by injunction an *ultra vires* transaction: *Ashbury Railway Carriage and Iron Co. v. Riche* (1875), L.R. 7 H.L. 653; *Attorney-General v. Great Eastern R.W. Co.* (1889), 5 App. Cas. 473; *Wenlock v. River Dee Co.* (1887), 36 Ch. D. 674, and (1885), 10 App. Cas. 354; *London County Council v. Attorney-General*, [1902] A.C. 165; *Patchell v. Raikes* (1904), 7 O.L.R. 470, 479; *Montreal Park and Island R.W. Co. v. Chateauguay and Northern R.W. Co.* (1904), 35 S.C.R. 48, 57; *Corporation of Whitby v. Grand Trunk R.W. Co.*, 1 O.L.R. 480. A remedy for breach of the agreement is provided by sec. 16 of the defendants' Act of

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incorporation; no by-law has been passed under that section. If workmen's tickets must be sold to every one, what occasion is there to use the word "workmen" at all: *Bush v. Watkins* (1851), 14 Beav. 425; *Stratford v. Bosworth* (1813), 2 Ves. & B. 341. It is not compulsory on the defendants to sell all classes of tickets on the cars: sec. 19 (*p*) of the by-law.

F. MacKelcan, K.C., and *W. R. Riddell*, K.C., for the plaintiffs, respondents. The plaintiffs are the inhabitants of the city of Hamilton (sec. 5 of the Municipal Act, 1903), suing in their corporate name, and, having a direct interest, do not need to invoke the aid of the Attorney-General. The fact that other persons besides the inhabitants may buy limited tickets should not deprive the plaintiffs of the right to bring an action. The plaintiffs have a pecuniary interest in the income of the defendants. Even if the agreement is not authorized by the defendants' Act, it is not thereby forbidden, and it is not *ultra vires*. (See authorities cited by counsel in the previous case, *ante* p. 577). On the 13th September, 1898, the defendants obtained from the plaintiffs, under sec. 8 of their by-law No. 955, an extension of their franchise to 1928, under and subject to the conditions and payments imposed by the by-law and agreement of the 26th March, 1892, the validity of which they now dispute; but they cannot accept the benefit and repudiate the obligation which accompanied it. The obligation of the defendants to issue limited tickets was thus recognized and extended. The Court has power to enforce the agreement: *Fry on Specific Performance*, 4th ed., sec. 104; *Greene v. West Cheshire R. W. Co.* (1871), L. R. 13 Eq. 44; *Todd v. Midland Great Western Railway of Ireland Co.* (1881), 9 L.R. Ir. 85; *Fenelon Falls v. Victoria R.W. Co.* (1881), 29 Gr. 4; *Jackson v. Normanby Brick Co.*, [1899] 1 Ch. 438.

Armour, in reply.

June 29. Moss, C.J.O.:—This is an appeal by the defendants from a judgment of Street, J., by whom the action was tried without a jury.

The questions in issue are set forth in the report of the judgment in 8 O.L.R. 642. Objections that the agreement, the enforcement of which is sought in this action, was *ultra vires*

have been dealt with adversely to the defendants in another action upon the same agreement. For the reasons there stated, as well as for those given by Street, J., the objections fail.

There remain the questions whether by the terms of the agreement the defendants are bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets" and to receive them from all persons tendering them as fares during certain specified hours of the day; whether the plaintiffs can maintain this action, or whether the Attorney-General alone has the right to sue; and whether performance of the contract can be enforced by the Court by means of an injunction or otherwise.

As to the first question it is argued from the use of the phrase "workmen's tickets" in sec. 19 (c) of by-law 634, which deals with the fares to be collected by the defendants, that they are not obliged to accept such tickets from all persons travelling on their lines during the specified hours, but only from such persons as answer the description of workmen. But this is not the language of the section. The defendants agree to issue these tickets not during specified hours or to any special class. There is no attempt made at description of persons who and who alone are to be deemed of the class entitled to demand or purchase such tickets. It was, no doubt, the intention to benefit the class of citizens commonly spoken of as "workmen" by enabling them to secure transport at reduced rates during certain periods of the day when they were going to or returning from their daily employment. And that may account for the phrase "workmen's tickets." But it never could have been in the minds of either party that it should be left open to controversy as to who were or were not entitled to use these tickets. Obviously the best and most convenient way of avoiding such questions was to provide generally, as has been done, for the issue of tickets at the reduced rate, followed by a declaration that they are to be "good," i.e., available for use by the holder, during the specified hours. They were designated "workmen's tickets" for purposes of reference only, and not because they were intended for use by some special class of citizens supposed to come under the undefined description of "workmen." And for years the defendants acted upon

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that understanding of the term; and in their amending by-law they speak of these tickets not as "workmen's" but as "limited" tickets. There appears to be no substantial reason for now saying that the construction thus early adopted and long adhered to was wrong.

Then is there any reason for saying that the defendants are under no obligation to keep tickets of this class for sale on their cars? The language of sub-clause (p) of sec. 19 of the by-law is explicit. It says that the defendants shall keep tickets for sale . . . upon their cars. It does not mention any particular kind of tickets. No limitation is placed upon the word unless—as the defendants contend—the words which follow impose some. They are: "And they shall sell tickets to persons desiring the same at a rate not exceeding twenty-five cents for six tickets for fare to any point within the city limits."

The sales referred to are not limited to sales on the cars. Sales at the office are included. And all that is intended is to repeat, for greater caution apparently, the maximum rate at which sales are to be made, whether at the office or upon the cars. The defendants are to sell at a rate not exceeding twenty-five cents for six tickets. There is nothing to cut down the general application of the words "tickets" and "upon their cars" in the earlier part of the sub-clause. Whatever may have been the reason for the insertion of the concluding words, there is no reason to suppose that they were put there with any intention of cutting down the earlier part.

Next comes the question whether the plaintiffs are entitled to maintain this action. It is to be borne in mind that here there is an express contract between the parties which has been broken by the defendants. If the effect of the breaches was to create a public nuisance, such as an obstruction of the public highway, the Attorney-General as representing the public could no doubt maintain an action for its abatement, though probably the plaintiffs would be necessary parties either as relators or defendants. See *Attorney-General v. Toronto Street R. W. Co.* (1868), 14 Gr. 673. It is to be observed that in that case, Mowat, V.-C., expressed the opinion (p. 674) that a suit against the street railway company to enforce the agreement with the city corporation must be brought by the latter. In such a case

the question of damage is not material. As pointed out in *Attorney-General v. Mid-Kent R. W. Co. and South Eastern R. W. Co.* (1867), L. R. 3 Ch. 100, there is a manifest difference in this respect between cases depending on nuisance and those depending on contract. Sir John Rolt, L.J., said (p. 104): "It is shewn by the case of the *Rochdale Canal Co. v. King* (1851), 2 Sim. N.S. 78, and many other authorities, that where there is a contract, the Court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance, but that the main point is whether the contract has been broken."

The plaintiffs have a material interest in the contract and the proper observance of it by the defendants, and the rights of the public in the large and general sense are not so exclusively involved as to displace the plaintiffs' right to maintain the action as parties to the contract, though the result may be to benefit certain of the public.

The last question is as to the relief awarded to the plaintiffs. The defendants urge that it involves the Court in seeing to the performance of continuous acts for a length of time—which the Court will not undertake. But here the Court is not asked to go the length to which it was necessary to go in order to give the relief claimed in *City of Kingston v. Kingston, etc., Electric R. W. Co.*, 25 A.R. 462, and the many cases which preceded it. In these cases the Court withheld its hand, although convinced that a breach of agreement had been committed in respect of which the party wronged was entitled to some remedy, because of the difficulties surrounding a specific performance of the agreement. But where the circumstances are such that the Court can prevent such a breach of a legal engagement by holding the parties specifically to abstain from breaking it, there the Court will interfere by injunction to restrain the breach of the positive engagement so entered into: *Holmes v. Eastern Counties R. W. Co.* (1857), 3 K. & J. 675. And in a proper case will even import a negative quality into an affirmative agreement. See *Doherty v. Allman* (1878), 3 App. Cas. 709, where Lord Chancellor Cairns says (p. 720): "I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively

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the performance of the covenant, may, in special cases, interfere to prevent that being done which would be a departure from, and a violation of, the covenant. That is a well settled and well known jurisdiction of the Court of Equity;" and then proceeds to state the considerations by which the Court ought to be governed in dealing with such cases.

Applying those considerations to the present case, they tend to support the exercise of the discretion in favour of the plaintiffs. The defendants are restrained from a breach of one term of the agreement, and, as pointed out in *City of Kingston v. Kingston, etc., Electric R. W. Co. (supra)*, the Court may and frequently does restrain parties from doing some particular act the doing of which is a breach or violation of an agreement.

The appeal fails and should be dismissed.

OSLER, J.A.:—I was obliged to leave the Court before the reply was concluded, but, so far as I heard the case, I thought that the attack upon my learned brother Street's judgment failed.

MACLAREN, J. A.:—The defendants have appealed from a judgment of Street, J., which declared that they were bound, under their agreement with the city of Hamilton, to keep for sale upon all their cars, to all persons desiring them, tickets called "workmen's tickets," and to sell the same to all persons desiring to buy them, at the price of eight tickets for twenty-five cents, and to receive such tickets in payment of fares from all persons during certain hours specified in the agreement.

The judgment also restrained the defendants from running on the streets of the city any cars upon which such tickets were not kept for sale.

The defendants were incorporated by the Ontario statute 36 Vict. ch. 100, and were authorized to construct and operate a railway upon the streets of the city of Hamilton and adjoining municipalities, subject to any agreement to be made between the city council and the company, and the council was authorized to pass any by-laws for the purpose of carrying into effect such agreements.

The terms of the agreement now in question were embodied in by-law No. 624 of the corporation of the city of Hamilton, passed on the 26th March, 1892, and this by-law was accepted by the defendants by agreement executed by the parties the same day. The by-law and agreement are to be found in schedule A to the Ontario statute 56 Vict. ch. 90.

It was thereby provided that the company should issue workmen's tickets at eight for twenty-five cents, good during certain hours named, etc. Tickets were to be kept for sale at some place in the business portion of the city, and also upon the cars.

On the 13th September, 1898, the city council passed an amending by-law, which was accepted by the company. It was therein provided that the clause of by-law No. 624 relating to workmen's tickets should be amended by providing "that limited tickets may be used from 5 to 6.30 p.m., instead of from 5.15 to 6.30 p.m.," etc. Under these by-laws and agreements the company issued these "workmen's" or "limited" tickets, to all persons applying for them, kept them for sale on the cars and elsewhere, and accepted them as fares from all passengers tendering them during the hours named in the by-law, up to September, 1904.

On the 19th September, 1904, the defendants passed a by-law reciting that workmen's tickets had been allowed to be sold on the cars, and that the privilege had been abused by others than workmen using them, and enacting that thereafter workmen's tickets should be sold only at the company's head office and at the office of such manufacturers and other employers of workmen as should apply for the same and as the directors should determine.

It was strongly argued that the defendants had the right to pass this by-law, on the ground that sec. 8 of the Act of 1873 gave them the right to fix the fares, and any agreement purporting to restrict this right was *ultra vires*. In support of this proposition the case of *Corporation of Whitby v. Grand Trunk R. W. Co.*, 1 O.L.R. 480, was cited. That case, however, was decided on the ground that the agreement there in question was not authorized by the statute. In my opinion, the words of the statute of 1873 are quite wide enough to cover

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the part of the agreements between the city and the defendants now in question. For valuable consideration and concessions they agreed to fix the rates at the amount named, and they cannot, while they retain these advantages, be allowed to repudiate the obligations thus assumed.

Another point urged by the defendants was that the Attorney-General was a necessary party. No direct authority in favour of this proposition was cited to us. I am of opinion that the plaintiffs have a sufficient interest, even a pecuniary interest, in that part of the agreement which they are seeking to enforce to enable them to maintain this action in their corporate name and alone. See *Wilson v. Furness R.W. Co.* (1869), L.R. 9 Eq. 28.

It is further urged on behalf of the appellants that the "workmen's tickets" mentioned in the first by-law are tickets which entitle only those who can properly be called "workmen" or "workingmen" to claim its benefit. I do not think the word is used in any such narrow or technical sense. It might almost as well be argued that it means only "workmen" and not "workwomen." But, even if one takes the strictly etymological meaning of the word, there is good authority for a definition that would include many classes of people not within the long alphabetical list of callings from "barbers" to "waitresses" set out in the list furnished by the company to its conductors. For instance, in the *Century Dictionary*, "workman" is defined as "one who works in any department of physical or mental labour;" and in this country there are comparatively few who would not fairly be comprised within this and the other definitions found in standard works.

But, as I have said, I do not think the word was used in any technical sense. I think these tickets were thus designated probably because they are so largely used and were intended specially to benefit those to whom the word is often applied, just as articles of dress are often named after a class because they are generally or largely worn by such class. Sailor hats and workmen's blouses are not exclusively worn by the classes named.

In addition to this, it is a matter worthy of remark, that when the amendment of 1898 was made, the expression

"limited tickets" was used by the parties as a synonym for "workmen's tickets," and it cannot reasonably be contended that there is anything in the new name to lend colour to the defendants' contention.

The further fact that the defendants themselves for eleven years, from 1893 to 1904, did not construe the agreement as they now desire to do, but sold such tickets on their cars to all who applied for them, and accepted them from all classes during the hours specified in the by-law, is not to be lost sight of. If the defendants had not construed and acted upon the old agreement of 1892 as they did, it is by no means certain that they would have been able to obtain from the city the concessions granted to them by the agreement of 1898. This is an additional reason for not straining the language to aid them in their present contention. See *Hardy Lumber Co. v. Pickerel River Improvement Co.* (1898), 29 S.C.R. 211.

Objection is also taken by the appellants to the form of relief by injunction granted by the judgment appealed from, and it is contended that it is contrary to the judgment of this Court in *City of Kingston v. Kingston, etc., Electric R.W. Co.*, 25 A.R. 462. A close examination of the facts, however, will, I think, shew that there is a clear distinction between the two cases. There the order asked for by the plaintiffs could not be carried out without minute supervision of the operation of the railway by the Court, in order to see that all the provisions of a certain clause in the agreement were being observed and complied with. Here there does not to my mind appear to be the same difficulty.

On the whole, I am of opinion that the judgment appealed from is correct and ought to be affirmed.

MACLENNAN and GARROW, J.J.A., concurred.

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[MEREDITH, J.]

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LANCASTER V. SHAW.

July 11.

Penalty—Ontario Election Act—Disqualified Person Voting—"Postmasters in Cities"—Sub-postmaster.

A sub-postmaster in full charge of a post office, though not the principal post office, in a city or town, is a "postmaster," within the meaning of sec. 4 of the Ontario Election Act, and is liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly.

ACTION for a penalty under the Ontario Election Act. The facts are stated in the judgment.

The action was tried before MEREDITH, J., without a jury, at London, on the 8th May, 1905.

H. B. Elliott and Edmund Weld. for the plaintiff.

G. C. Gibbons, K.C., for the defendant.

July 11. MEREDITH, J.:—Under the Ontario Election Act, sec. 4, "postmasters in cities and towns" are, among many other public officers, disqualified as voters at legislative elections, and are made liable to a penalty of \$2,000 if, disregarding such disqualification, they do vote at any such election; and the only question for consideration is whether the defendant was such a postmaster; he voted at a legislative election, notwithstanding objection to his vote on the ground of such disqualification.

The enactment originally provided that "all" public officers, of the several classes disqualified, should be so disqualified; but in the revision of the statutes in 1887 the word "all" was in every instance eliminated, but plainly so only because of its being superfluous—see sec. 9 (1) of ch. 2 of those statutes; it had no effect upon the extent of the disqualification; after, as well as before, the meaning was that every postmaster in every city and town is disqualified; and so the enactment now remains.

The reason of the disqualification of such postmasters does not plainly appear, but possibly it was imposed to curtail the influence of federal officers in provincial elections, judges

and customs and excise officers, besides others, being also disqualified.

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The defendant was, in the year 1901, appointed postmaster of London South post office, a post office in the city of London; and his appointment has never since been revoked, nor he, in any other manner, removed from office; but the character of the office has been to some extent changed; and on the 10th day of January, 1902, he signed the paper (exhibit 5) headed "Memorandum of conditions on which sub-offices in cities will be established and maintained," etc., in which he declared that he accepted his position as sub-postmaster at London South subject thereto. Before that time "mail matter" posted in the ordinary way at this office was put in mail bags by the postmaster and sent to the London office for distribution, and letters for London South were sent in mail bags from the London office for distribution there. But these were changes consequent upon the introduction of the system of free delivery, and a general distribution of receiving boxes, throughout the city of London, the rule being that where such a system is in force letters are not to be delivered at the post office, but are, throughout the city, to be delivered by the letter carriers, unless notice in writing to the contrary is given; and that rule applies to the office in question; and with receiving boxes at various points—one at the office in question—from which letters are at stated hours collected throughout the city—see sec. 2, sub-sec. 2 (1), of 52 Vict. ch. 20 (D.)—it would be labour lost for the postmaster to continue to put them in mail bags, the collectors doing that at all receptacles; and if the same system of free delivery and collection were adopted throughout the country the same result would very generally follow as to rural as well as urban post offices; one central office or several central offices in each county, electoral district, or other defined locality, would mainly control the distribution and collection of all mail matter.

In other and more important matters the defendant's duties as postmaster remained unchanged; as postmaster he issued and as "postmaster" he signed post office orders, issued postal notes, and carried on post office savings bank business, and received and as "postmaster" gave receipts for registered

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letters; these are all things which unless he was a postmaster he would have no power to do: see sec. 66 of the Post Office Act; and in respect of most, if not all, of these things his office was an independent one, the business of it being transacted by him, in his own name, as postmaster of that office directly with the post office department in Ottawa, in no way subject to the London or any other office. And as postmaster he was paid, partly by a percentage of the amount collected by him; see sec. 53 of the Act; and the report of the Postmaster General for 1904, made under 52 Vict. ch. 20, sec. 3, sub-sec. 3 (D.), at p. C-26. His store also had the sign "London South Post Office" over it—see sec. 109 of the Post Office Act; and the character of the official stamp of his office appears on exhibits 2 and 7, differing entirely from the stamp of the London, or city, office.

No authority for the establishment of sub-post offices was referred to at the trial, no evidence of any orders or regulations respecting them was given, and I have been unable to find anything in the Act or elsewhere directly or indirectly referring to them or to sub-postmasters. The Act explicitly provides for the establishment of branch post offices, not only in cities but in other places: sec. 36. And nowhere have I been able to find any reference to any but two classes of postmasters, those appointed by the Governor in council and those appointed by the Postmaster General, sec. 49 of the Act providing that "the Governor in council may appoint all postmasters having permanent salaries in cities and towns," and that "all other postmasters may be appointed by the Postmaster General."

But, by whatever name the defendant's office may be called, whether postmaster of high or of low degree, he was a postmaster; his post office was in a city; he resided in that city; his right to vote, if not disqualified, was in that city; and he voted in that city; how then can he escape the penalty?

Not because it is a penalty; nor because it is a heavy one. "Every Act . . . shall be deemed remedial, whether its immediate purport be . . . to prevent or punish the doing of anything which it deems"—that is, the Legislature deems—"to be contrary to the public good—and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the

Act. . .” The object of imposing the penalty was to prevent voting by disqualified persons. The defendant voted with his eyes open and in the face of objection on the one ground of such disqualification. Having taken the chances, he has no right to complain of the hardness of the case; and hard cases must not be permitted to make bad law, must not be used to thwart the law. Besides, “the Court or a Judge” has power to remit the whole or any part of the penalty: R.S.O. 1897, ch. 108.

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Reliance for the defence was not based so much on the ground that the defendant was not a postmaster, but that he was not a “city postmaster” and never had been; an argument based entirely upon the provisions of the Civil Service Act, in which that expression is used in reference to “postmasters having permanent salaries in cities,” as it is expressed in the Post Office Act—sec. 49. But it is difficult to understand why that expression used in a parliamentary enactment should control a different expression used in a legislative enactment. The latter enactment is not postmasters *of* cities, which might mean the postmaster *of* the city only, but is “postmasters *in cities and towns*,” that is, every postmaster in every city and town, whether paid by permanent salary or not, and whether the postmaster of the city or a postmaster of any part of a city or town.

Then it was said that a postmaster of so small an office as that which the defendant had could not have been meant. But why not? Other officers of less importance are by the same enactment disqualified; every officer of the customs is. And a postmaster, such as the defendant, is one more likely to come in contact with the electors than the postmaster of the city; such postmasters are generally tradesmen, and seek the office for the custom it may bring to their businesses, and the work of the office is generally done by the postmaster himself, while the postmaster of a city seldom comes in contact with the public generally in regard to any matters connected with the business of the post office. The political influence which might be acquired or exercised through an office such as the defendant has might be greater than that which might be acquired by a city postmaster through his office.

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But, whatever may be the duties of the defendant's office and whatever may have been the purpose of disqualifying postmasters in cities and towns, London South is a post office, and a post office having a postmaster, who acts in all things in connection with such office as postmaster; and is so described in the Official Guide; see for an instance p. 95 Official Postal Guide Canada, 1905—exhibit 6; and a postmaster of a post office of the highest grade, that is, one having power to issue and pay money orders and postal notes and to transact post office savings bank business, as well as handle registered letters—an accounting post office; see also pp. 1, 212, and 330 of the Official Guide: and entirely independent of any other postmaster in these, if not in all, respects: though, if that were not so, what difference would it make? A colonel or a captain is not the less a colonel or a captain because he is subordinate to another colonel or captain, as he must be more or less, according to circumstances, to his seniors of the same rank. It would be obviously futile to contend that the defendant was a mere clerk of the London post office; he might have a clerk under him, but in that case he would be bound to pay the wages, the clerk would be his entirely; he was and is in all respects—except those rendered unnecessary under the free delivery system: sec. 40: and under the establishment of letter or pillar boxes through the city: sec. 9, sub-sec. (n.)—a postmaster just the same as thousands of others throughout the Dominion are, except that a great majority of them are not of as high rank—have not as many and important duties and responsibilities—as he.

I am indebted to the courtesy of the Postmaster General for a very comprehensive and clear statement, of the post office department, given upon my request, in respect of the legal authority respecting the appointment of sub-postmasters, from which it does not appear that there is any order in council affecting the matter, but it does appear that it is based upon the Post Office Act, which, as before mentioned, refers to two classes of postmasters only, those appointed by the Governor in council and those appointed by the Postmaster General, all of whom have under the Act the title alike of postmaster.

There will be judgment for the plaintiff with costs of the action; proceedings will be stayed until the first day of October.

next; the defendant may, if he so desires, move on Saturday next at 10 a.m., on notice to the plaintiff, for a remission of the penalty in whole or in part; if no motion be made, the damages will be \$2,000; if made, the assessment of damages will be delayed until the hearing of the motion.

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[The time was subsequently extended until after the long vacation, but the defendant did not move, and judgment was entered for the plaintiff for \$2,000.]

T. T. R.

[IN THE COURT OF APPEAL.]

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1906

June 29.

MORIARITY V. HARRIS.

Constable — Assault — Trespass — Unofficial Act — Absence of Malice — R.S.O. 1897, ch. 88.

Held, reversing the decision of a Divisional Court, 8 O.L.R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had, officially, authority to do what he did, and was therefore, although the plaintiff did not prove malice, not entitled to the protection afforded by sec. 1, sub-sec. 1, of R.S.O. 1897, ch. 88, and was liable for the trespass.

Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522, followed.

Review of English and Ontario cases.

APPEAL by the plaintiff from the order of a Divisional Court, 8 O.L.R. 251, allowing an appeal by the defendant from the judgment of Meredith, C.J.C.P., at the trial, and dismissing the action with costs.

The action was brought to recover damages for trespass and assault. The plaintiff was employed by the corporation of the city of Hamilton, and was driving a watering cart upon the occasion of the assault. The defendant was a police constable, and pleaded that the acts complained of were done by him, if at all, in the performance of his duty as police constable and without malice, and he claimed the benefit of R.S.O. 1897, ch. 88. The plaintiff replied that there was such excess as to shew malice and deprive the defendant of the protection of the statute.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 23rd February, 1905.

H. Carscallen, K.C., for the plaintiff, appellant. The defendant was not acting *virtute officii* on the occasion in question. His action was gratuitous; it was no part of his duty as a police officer to comply with the request of the market clerk. It is only to strictly official acts done in the capacity and in discharge of the functions of a peace officer that the statute extends. To acts casual and not official, and that might be done equally by any person other than a

constable, the Act has no application. The defendant was a trespasser *ab initio*, and is not entitled to the protection of the statute I refer to *Parton v. Williams* (1820), 3 B. & Ald. 330; *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522.

F. MacKelcan, K.C., and *G. Lynch-Staunton*, K.C., for the defendant. The evidence shews and the jury found that the defendant was acting *virtute officii* and in good faith and in accordance with the order of the market clerk, to whom the council had assigned the duty of controlling the market, and he was, therefore, entitled to the protection of the statute. The jury found that the plaintiff was obstructing a public place, and the defendant was endeavouring to abate the obstruction, which was one of his duties as police officer, irrespective of the market clerk. The defendant did not resort to force until he *bonâ fide* believed that it would be impossible for him to perform his duty without doing so, and the finding of the jury is conclusive on this point. The plaintiff cannot now be allowed to contend that the defendant was not acting as a police officer, having given notice of action, and the case having until now proceeded on that assumption. We rely on the cases referred to in the Court below.

Carscallen, in reply.

June 29. The judgment of the Court was delivered by GARROW, J.A.:—Appeal by the plaintiff from the judgment of a Divisional Court reversing the judgment at the trial before Meredith, C.J., and a jury in the plaintiff's favour.

The case is now reported in 8 O.L.R. 251.

Upon the jury coming in with their verdict the following occurred:—

"His Lordship: Is this assessment of damages, \$300, upon the assumption that the constable had no right at all to arrest him, and that all was illegal, or is it upon the assumption that the constable used more violence than was necessary and is it for that additional violence? Which is it?"

"Juror: He used a little too much violence."

"His Lordship: Then I will add to that, 'for the excess.' And as to the answer to question 9, what does that mean? What do you say as to 'without reasonable and probable

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cause?' I suppose your answer means that although he had not reasonable and probable cause he did not act maliciously.

"Juror: That is the idea.

"His Lordship: Then I will make that clear. Would you make the damages any greater if the constable was wrong as a matter of law, or would you put the damages the same even if he thought he had the right to remove him but had not in law?

"Juror: We are all agreed on the \$300.

"His Lordship: In either case? Very well."

This citation from the proceedings seems necessary in explanation of the statement in the judgment of Street, J., that the damages were assessed for the excess only, without objection by the plaintiff. A similar statement but somewhat larger in scope appears in the judgment of Idington, J., who says the whole trial proceeded on the assumption that the defendant was a police constable on duty and was not guilty of more than excess.

A careful perusal of the case has failed to convince me that the plaintiff at the trial or at any other time intended to confine his claim to anything less than the evidence would warrant, or that the defendant was or could reasonably have been misled into believing anything to the contrary.

True, the notice of action, like the statement of claim and the replication, is somewhat complex, but they all indicate a charge against the defendant of trespass as well as one for malicious proceedings as a peace officer. And I therefore think it was quite competent for the appellant's counsel to contend, as he did before us, that the acts and conduct of the defendant on the occasion in question amounted to a wholly unauthorized trespass, from the consequences of which the defendant is not entitled to the protection afforded by the provisions of R.S.O. 1897, ch. 88, sec. 1, sub-sec. 1. That statute was intended for the protection from *vexatious* actions of public officers discharging public duties, that is, "who are performing acts which they are bound or required to perform by reason of their public function or character." "They are permitted in such cases to tender amends for their *wrongful* conduct before they

are sued for it." See *per* A. Wilson, J., in *Hodgins v. Corporation of Huron* (1866), 3 E. & A. 169, at p. 190.

The distinction between the case of an official sued for anything by him done in the performance of such duty, that is, acting within the jurisdiction conferred upon him by law, but blundering by the way, and an official acting without or in excess of his legal jurisdiction, is very clearly pointed out in the statute. See sec. 1, sub-sec. 1, as contrasted with sec. 2. In the former case it is necessary to allege and also to prove malice and the absence of reasonable and probable cause, but in the latter it is not. And this distinction is also pointed out in a recent English case under a statute similar in terms, *Polley v. Fordham* (1904), 20 Times L.R. 639. In that case a magistrate, so far as appears in good faith, but negligently, had issued a distress warrant to enforce a conviction which on its face shewed that he had no authority upon the facts set forth. He did not, however, read the conviction, and no one apparently pointed out the defect to him, and yet it was held by the King's Bench Division that it was not necessary in an action against him for damages for the trespass arising from the seizure under the distress warrant, the conviction having been set aside, to allege or prove malice or want of reasonable and probable cause, and that in effect he had no defence to the action.

But even where the official has acted without jurisdiction and it is proposed to sue him in trespass he may be entitled to notice of action: *Sinden v. Brown* (1890), 17 A.R. 173; *McGuinness v. Dajoe* (1896), 23 A.R. 704; the distinction between the cases in which it is and is not necessary having been, I think, accurately pointed out by Osler, J.A., in the latter case at pp. 711, 712, where he says: "Doubtless he (defendant, a magistrate) was a trespasser as he had no authority to issue the warrant . . . under the circumstances, but in issuing it he was doing an act, the nature and description of which was such as his general character of justice of the peace authorized him to do; that is to say, issuing a warrant of arrest upon an unsatisfied conviction, which upon its face purported to be enforceable in that manner, and which the defendant in good faith believed he had the right so to

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enforce." *Township of Logan v. Hurlburt* (1896), 23 A.R. 628, illustrates the other aspect. There the Board of Health, although public officers, were held not entitled even to notice of action because what they did, although they were acting officially, was not and could not have been reasonably considered to be within their official powers or jurisdiction, and in that respect that case very much resembles, in my opinion, this, although it is unnecessary to hold that no notice of action at all was necessary, a sufficient one having been given.

The right, however, to a notice of action is one thing, and a totally different question is presented where, as here, there is a notice and all preliminaries have been observed, and the question is simply whether or not the trespass has been legally excused or justified.

A constable has no right or immunity as such to commit a trespass. Certain statutory advantages in defending himself have been given to him, such as notice of action, special venue, special limitation, and the opportunity to tender amends before action. But when the plaintiff has complied with the statutory provisions in launching his action, the trespassing constable is upon the same footing as any other trespasser unless his case falls within the protection of the before-quoted sec. 1 of R.S.O. 1897, ch. 88. And he may be liable as a trespasser if he acts excessively, as has in the present case been found by the jury to be the fact: *Gordon v. Denison* (1895), 22 A.R. 315; *Wright v. Court* (1825), 4 B. & C. 596; *Hamilton v. Massie* (1889), 18 O.R. 585. And the excess may and usually will make him liable as a trespasser *ab initio*; *Hoover v. Craig* (1885), 12 A.R. 72; *Jones v. Grace* (1889), 17 O.R. 681.

Then what are the facts? The plaintiff was a civic employee under the street watering department. He was not in any way subject to the control or bound to obey the orders of the market clerk, who, as superintendent of the market, had, under the by-law, a limited control over those who resorted to it for the ordinary purposes of buying and selling. The plaintiff was engaged in the discharge of his duty, and for that purpose had proceeded to the market ground, which it was his duty to water. He was met there, while in the discharge of his duty, by a crowd of sightseers intent upon witnessing the

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bicycle performance—a performance for which, as the jury has found, the market was not intended. Owing to the unusual crowd a jam was threatened, and the market clerk, to avoid the jam with its consequent dangers, told the defendant to move the waggons on out of the way, the watering cart in particular. The defendant, accordingly, although in no way bound to obey the orders of the market clerk, ordered the plaintiff to move on, and he did so, but, it is said, turned on the water for the purpose apparently of performing his duty, and, after some altercation, the defendant got up upon the cart and laid violent hands on the plaintiff, for the purpose, not of arresting him, but simply in order to obtain possession of the lines. The plaintiff very naturally resisted, and in the tussle was, in consequence of the defendant's violence, forced or fell from his seat to the ground and was severely injured. The plaintiff was not a criminal. He had not even, so far as appears, committed or threatened to commit a breach of the peace or even an offence against a municipal by-law, and the defendant had, under these circumstances, absolutely no legal right whatever to lay hands upon him at all. He cannot justify under the market clerk's direction or order, even if otherwise wide enough for the purpose, for the market clerk could not lawfully order to be done that which the defendant did: *Mill v. Hawker* (1875), L.R. 10 Ex. 92. And in any event the market clerk did not in fact order that which the defendant actually did, so that, in any event and upon the most favourable view for the defendant, he would be liable in trespass for the excess, as found by the jury, which is really after all, all that the judgment at the trial was for. Unfortunately there is in the judgments in the Divisional Court no discussion of the adequacy or otherwise of the alleged justification. All of the learned Judges apparently proceeded upon the common ground that the defendant was entitled to the protection afforded by sec. 1, sub-sec. 1, of R.S.O. 1897, ch. 88, and that the plaintiff having failed to prove malice the action failed.

I am, with deference, quite unable to agree with that view. In my opinion the defendant, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and

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without authority or any reason to think that he had, officially, authority to do what he did, and is therefore not entitled to the protection which he claims.

The claim is not, I think, supported by the cases referred to, and apparently relied upon in the judgments, and to which perhaps it is due that I should make a short reference in support of my conclusion in opposition to that of the Divisional Court.

In *Chamberlain v. King* (1871), L.R. 6 C.P. 474, and *Griffith v. Taylor* (1876), 2 C.P.D. 194, the question was simply the preliminary one of the defendant's right to a notice of action.

In *Gosden v. Elphick* (1849), 4 Ex. 445, and *Parton v. Williams*, 3 B. & Ald. 330, the question was also of the same nature, namely, as to the defendant's right to the benefit of the special limitation of action against officials, and in *Staight v. McGee* (1818), 2 Stark. 445, a similar question as to the right to a local venue. In *Theobald v. Crichmore* (1818), 1 B. & Ald. 227, the constable held a warrant, but had exceeded his authority in breaking open the outer door of a dwelling-house, and the sole question again was as to his right under the circumstances to the benefit of the special limitation clause; and in *Atkins v. Kilby* (1840), 11 A. & E. 777, the constable also had a warrant under which he acted.

Kelly v. Barton, 26 O.R. 608, affirmed in this Court in 22 A.R. 522, was also referred to. But that case, as I understand it, so far from helping the defendant, is a clear authority for the plaintiff, anticipating in fact the law as laid down in the before-cited case of *Polley v. Fordham*—and is, in my opinion, really decisive of the present appeal. In that case a police constable had without a warrant arrested the plaintiff for an alleged infringement of a city by-law. The notice of action did not allege that the act complained of was done maliciously and without reasonable and probable cause, and Ferguson, J., held it was necessary to so allege and also to prove the allegation at the trial. But the Divisional Court held otherwise, and the judgment was affirmed by this Court. The decision therefore in *Kelly v. Barton* was that in such an

action it is not necessary to *allege* malice, and if it is not necessary to allege it, it is not necessary to prove it; in other words, the case does not fall within sec. 1, sub-sec. 1, of R.S.O. 1897, ch. 88.

I think the appeal should be allowed, and the judgment at the trial restored, all with costs to the plaintiff, including the costs in the Divisional Court.

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[TEETZEL, J.]

RE CALDWELL AND TOWN OF GALT.

1905

July 26.

Municipal Corporations—By-law Limiting Number of Tavern Licenses and Prescribing Accommodation—"License Year"—Liquor License Act—Objections to Procedure—Validity of By-law.

A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year," in prescribing the number of tavern licenses for the "ensuing license year."

In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years:—

Held, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year.

Sections 20 and 29 of the Liquor License Act, R.S.O. 1897, ch. 245, considered. Objections to the procedure of the council in relation to the passing of the by-law were overruled, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation.

MOTION by one Caldwell, a ratepayer of the town of Galt, to quash by-law number 784 passed by the town council on the 28th February, 1905. The facts are stated in the judgment.

The motion was heard by TEETZEL, J., in Vacation Court, on the 22nd July, 1905.

J. Bicknell, K.C., for the applicant.

W. H. Blake, K.C., for the corporation of the town of Galt, the respondents.

July 26. TEETZEL, J.:—The purpose of the by-law, as described in its heading, is "to limit the number of tavern licenses in the town of Galt and to prescribe the accommodation to be possessed by taverns and to fix the amount of license duties thereof for the year 1905-1906."

Clause 1 enacts "that the number of tavern licenses in the town of Galt for the ensuing license year shall not exceed seven;" and clause 3 enacts "that the necessary accommodation for taverns in the town of Galt shall be twelve furnished bed-rooms, over and above those required for the use of the tavern-keeper and his family, with stabling for twenty horses, and the necessary hay and oats therefor."

Provision for enacting these two clauses is contained in secs. 20 and 29 of the ~~Liquor~~ License Act, R.S.O. 1897, ch. 245.

Clause 1 is objected to ~~because~~ it omits, immediately after the words "license year," the words "beginning on the first day of May," etc.

Section 20 provides that "the council of every city, town, etc., may, by by-law to be passed before the first day of March in any year, limit the number of tavern licenses to be issued therein for the then ensuing license year beginning on the first day of May," etc.

The statute provides no form for the by-law.

I think that a by-law passed before the 1st March, 1905, and purporting to be in respect of the license year 1905-1906, and using the words "ensuing license year," must be construed as having reference to the statutory license year, which begins on the 1st May. The by-law must be read in connection with the statute by virtue of which it was passed, and so reading it there is no room for uncertainty in this case, nor for the contention that it is wider than the statute; and the objection fails.

The objection to clause 3 of the by-law is that it is beyond the power of the council, under sec. 29, because it does not limit its provisions to the *then ensuing license year*, etc.

Section 29 authorizes the council by by-law, passed before the 1st March in any year, for the then ensuing license year beginning on the 1st May, to prescribe requirements as to accommodation to be possessed by taverns, etc.

With some doubt I think this objection also fails.

The scope of the by-law is limited on its face to the license year 1905-1906, and, reading all the provisions of the document together, I am inclined to think that the council has not exceeded the power given to it by the Liquor License Act.

Read in the light of the statute under which it was passed, I would construe the whole by-law as making provision for fixing the number of licenses, the amount of the license fee, and the accommodation required in respect of the license year beginning on the 1st May, 1905.

Several other objections were raised in the notice of motion and on the argument by Mr. Bicknell to the validity of the

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by-law, based upon alleged insufficiency in the notices calling the special meeting of the council and of the introduction of the by-law, in not setting forth the scope of the proposed by-law; that no notice of the introduction of the by-law had been given at a previous meeting, nor was it introduced by an order of the council; and the further objections as to procedure set forth in the notice of motion. An objection that certain of the aldermen were interested in a project to provide stabling was not seriously pressed.

From a perusal of the minutes of the proceedings of the council, I think the notices objected to were sufficiently specific, and I am not satisfied that there was any serious departure from the rules of procedure contained in by-law 600 of the council.

Being of opinion that the by-law is valid on its face and is the will of the majority of the council, and that none of the objections now raised were raised by any member of the council, and that the matters now objected to were matters of internal regulation, effect should not be given to such objections, founded as they are on extrinsic evidence as to regularity of procedure, unless there is such a manifest illegality that it would be unjust that the by-law should stand.

See *Re Jones and City of London* (1899), 30 O.R. 583, at p. 587, and cases there cited. See also *In re Smith and City of Toronto* (1860), 10 C.P. 225; *Re Milloy and Township of Onondaga* (1884), 6 O.R. 573; and *Re Kelly and Town of Toronto Junction* (1904), 8 O.L.R. 162.

The motion must be dismissed with costs.

E. B. B.

[IN THE COURT OF APPEAL.]

THE CORPORATION OF THE CITY OF TORONTO

v.

THE TORONTO ELECTRIC LIGHT CO.

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Oct. 13.

THE CORPORATION OF THE CITY OF TORONTO

v.

THE INCANDESCENT LIGHT CO., OF TORONTO, AND THE
TORONTO ELECTRIC LIGHT CO.

Company—Amalgamation—Restraint Against Selling Out—Agreement—Forfeiture—Laches—Waiver—Notice.

In 1889 the city of Toronto entered into similar agreements with the defendant companies, by which they authorized these companies to lay down and operate underground wires and appliances for the distribution and supply of electricity, and gave them other privileges in connection with their business. By these agreements the defendants were forbidden to lease to, amalgamate with or sell out to any other company, without the consent of the plaintiffs; and if they did so, all rights granted thereby were to cease and determine. In 1896 the Incandescent Co. sold out all their assets and the shareholders transferred their shares to the Electric Light Co.:—

Held, that the Toronto Electric Light Co. had not in purchasing fallen within the prohibition clause, for to hold to the contrary would be to add the word "buy" to that clause.

Held, also, that what had been done was not an amalgamation of the two companies inasmuch as the purchase was for cash and for cash only, and the Incandescent Light Co. acquired no interest whatever in the assets and affairs or otherwise of the other company.

Held, further, that inasmuch as the actions were not commenced till April, 1902, the plaintiffs had by their long delay in bringing suit and also by their conduct after the alleged breach and before the action lost their right to complain. The plaintiffs had by their conduct waived the alleged forfeiture, the evidence clearly shewing that they had knowledge throughout of the facts upon which the right to claim a forfeiture rested, and it was not necessary to prove actual notice.

Held, lastly, that notice to the city engineer was in the circumstances of this case sufficient although the evidence shewed much more than that, and warranted the conclusion that knowledge of the absorption of the one company by the other was common and general throughout the city and might safely be imputed to the city council as a whole especially as no civic official had denied such an inference.

THESE were appeals by the plaintiffs from the judgment at the trial of FALCONBRIDGE, C.J.K.B., who dismissed both actions with costs. The facts sufficiently appear from the judgment.

The appeal was argued on May 1st, 1905, before MOSS, C.J.O., and OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A.

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G. F. Shepley, K.C., and *J. S. Fullerton*, K.C., for the city of Toronto on the question of amalgamation referred to *Bank of Hindustan v. Alison* (1870), L.R. 6 C.P. 54, 74; *Wall v. London and Northern Assets Corporation* (1898), 2 Ch. 469; as to acquiescence to *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417; *Eastern Telegraph Co. Limited v. Dent*, [1899] 1 Q.B. 835; Encyc. of Laws of England, vol. 1, *sub voc.* 'Acquiescence'; as to notice to officers: *Dillon on Municipal Corporations*, 4th ed., vol. 1, p. 322, par. 238 n.; *Amer. & Eng. Encyc. of Law*, 2nd ed., vol. 1, p. 1146. He also cited *Bigelow on Estoppel*, 4th ed., p. 522.

A. B. Aylesworth, K.C., and *E. F. B. Johnston*, K.C., for the Toronto Electric Light Co., contended that there was a clear distinction between a sale and an amalgamation: 54 Vict. ch. 38, sec. 18, (O.); that there had been no leasing, amalgamation or sale so far as their clients were concerned: *In re South African Supply & Cold Storage Co.*, [1904] 2 Ch. 268 at pp. 286-7; *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 6, p. 801, *sub. voc.* 'Consolidation'; and that there had been ample consent on the part of the city to what had been done apart from waiver and estoppel which the evidence clearly established.

H. O'Brien, K.C., and *J. S. Lundy*, for the Incandescent Light Co.

Shepley, in reply.

October 13. The judgment of the Court was delivered by GARROW, J.A.:—These are appeals by the plaintiffs from the judgment at the trial of Falconbridge, C.J., who dismissed both actions with costs.

The actions were tried together, and were brought to obtain declarations that the defendants had forfeited certain rights severally granted to them under two agreements with the plaintiffs, and for injunctions restraining the defendants from any longer constructing, laying down or operating any conduits, wires or appliances in the streets of the city of Toronto and compelling the immediate removal of all such conduits, etc., theretofore constructed or laid down therein and the restoration of the surface to its original condition.

The first agreement dated July 31st, 1889, was with the defendants, the Incandescent Light Co., whereby that company was authorized to lay down and operate underground wires, conduits, etc., in the city streets for the distribution and supply of electricity.

The other agreement, dated November 13th, 1889, was with the defendants, the Toronto Electric Light Co., and after reciting that this company was already engaged in the business of producing and supplying electric light on the overhead system, authorized the said company to construct, lay down and operate underground wires, etc., for the distribution and supply of electricity in addition to their then established overhead system.

By both agreements it was provided that all openings for the purposes aforesaid in the city streets, etc., should only be made after notice in writing to the mayor and city engineer and under the supervision of the city engineer and at such times and places and in such manner as he might from time to time direct. By both agreements the defendants were severally prohibited from leasing to, amalgamating with or selling out to any other company, corporation, firm or individual without the consent of the plaintiffs and both agreements provided that upon a breach of the said prohibition all rights granted thereunder should thereupon cease and be forfeited.

On February 22nd, 1896, the defendants, the Incandescent Light Co. sold to the Toronto Electric Light Co. all their assets, rights, credits and effects and the shareholders transferred all their shares in the capital stock of that company to the defendants, the Toronto Electric Light Co., or to their nominees, by reason whereof the plaintiffs claim the forfeiture, and other relief before mentioned.

The learned Chief Justice of the King's Bench reached the conclusion that whether what was done was or was not a violation of the terms of the agreement, which he doubted, the plaintiffs had lost the right to complain by reason of waiver and acquiescence, and dismissed the actions.

As against the defendants, the Incandescent Co., the breach is not disputed but it is contended by the defendants, the Toronto Electric Light Co., that in purchasing they did not fall

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within the prohibition prescribed in their agreement and this contention is, in my opinion, well founded. To hold otherwise would be to add to the prohibition the word "buy" as well as the other word "sell" for which there is in my opinion no warrant.

Appreciating the force of this contention the plaintiffs contended that what was done was in fact an amalgamation of the two companies but the facts established by the evidence are entirely against this contention. The purchase was a purchase for cash and cash only. The Incandescent Light Co. acquired no interest whatever by the transaction in the assets, affairs or otherwise of the other company, and in fact declined to enter into the transaction upon any footing but that of a sale out and out and for cash only. Such a transaction cannot in law or in reason be called an amalgamation. In *Wall v. London & Northern Assets Corporation*, [1892] 2 Ch. 469, at page 479, Lindley, M.R., a very learned and experienced Judge in such matters says: "I do not see how a company as a business transaction can practically amalgamate with persons or companies carrying on business unless the company in some way or other sells its assets as a whole *not for money for that would be a simple sale, but for shares in the purchasing company.*"

I am therefore of the opinion that in so far as the defendant the Toronto Electric Light Co. is concerned the doubt of the learned Chief Justice was well founded and that no breach of the plaintiffs' agreement with that company was committed by the purchase of the assets of the Incandescent Co.

And I also agree with the learned Chief Justice that in any event and as to both companies the plaintiffs have by the long delay in bringing suit, and by their conduct after the alleged breach and before action lost their right to complain.

The breach occurred on February 22nd, 1896. The actions were not commenced until the 17th of April, 1902. The defendants, the Incandescent Light Co., have been out of business since the year 1896. They have not since that date used or threatened to use the franchise originally granted to them by the plaintiffs. The breach of which the plaintiffs complain as against that company is admitted in the pleadings and a declaration to that effect would probably be as harmless to the defen-

dants, the Incandescent Light Co., as it would be useless to the plaintiffs, unless relief is also given against the other company. As to the other relief claimed against the defendants, the Incandescent Light Co., namely, that by way of injunction, the plaintiffs' laches alone, apart from any question of waiver would probably be a bar: see *Attorney-General v. Sheffield Gas Co.* (1852), 3 DeG.M. & G. 304. But it is not necessary to determine that because both companies claim that the plaintiffs by their conduct have waived the forfeiture and if that contention is well founded it will not, I think, be useful to consider the mere laches by itself, or otherwise than as an element in the larger subject. The forfeitures in question were of course such as could be waived. And the standpoint from which the subject is to be considered is not essentially different in any respect that I can see from that applicable in the case of an ordinary breach of covenant with a proviso for forfeiture upon breach.

The burden of proof was upon the defendants to establish knowledge by the plaintiffs of the essential facts upon which the right to claim the forfeiture rested, but it was not, I think, necessary to prove what is called actual notice to the plaintiffs of the agreement itself between the defendants, but was sufficient to shew such a state of affairs as reasonably indicated that the covenant in question had been broken. And this burden of proof, notwithstanding the deceptive circumstances so much relied on by the plaintiffs in the argument, such as the retention of the officers of the Incandescent Light Co. by the Toronto Electric Light Co. and its use, in correspondence, of the stationery and forms in use by the former company, the assessment in the name of the Incandescent Co. of property which by the sale had passed to the other company, etc.,—the defendants, in my opinion, did satisfy by the evidence at the trial. Light is cast upon all the subsequent circumstances from which knowledge is to be inferred, from the contents of the letters from the plaintiffs' solicitors to the defendants in the month of January preceding the sale. These letters were written to protest against an amalgamation of the companies. They shew that it had even then become a matter of newspaper discussion, and therefore of public notoriety, that negotiations were on foot between the companies at least looking towards a result such as

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that which afterwards actually took place. The matter concerned the supply by one or the other of the two companies, for there were no others, of a commodity in general use throughout the city, in public buildings, as well as in private dwellings—one in fact of the so-called public utilities. Up to the sale all the incandescent light, the one usually used for indoor lighting, had been exclusively supplied by the Incandescent Light Co. After the sale that company ceased to do business and its business was taken over and thereafter carried on and its plant taken and held possession of by the Toronto Electric Light Co. who greatly increased and extended the underground plant at an expense, it is said, of several hundreds of thousands of dollars. And it is to be remembered that under the agreement with the city not an opening could be made in a city street even to repair, without notice to the mayor and city engineer, and under the personal supervision of the latter. Then all the accounts for restoring the pavements (which restoration was apparently done by the plaintiffs and charged to the company) were from the month of June, 1897, always rendered by the plaintiffs to and paid by the defendants, the Toronto Electric Light Co. The numerous customers throughout the city using incandescent light must immediately have known of the change from their monthly accounts, if in no other way, and among such customers were the plaintiffs themselves who entered into a contract with the defendants, the Toronto Electric Light Co., in November, 1898, for the supply of incandescent light for the new court house. And finally the city engineer in his report for the year 1901 mentions the "absorption" of the Incandescent Co. by the other company although, singularly, he was not called by the plaintiffs to shew when or how he became aware of such absorption.

Notice or knowledge can only be brought home to a corporation through those who act for and represent it, and notice to the city engineer should under the circumstances of this case be sufficient, although there is, I think, much more than that, for, in my opinion, the evidence would from the peculiar circumstances of the case, warrant the conclusion that the knowledge of what the city engineer calls the "absorption" was common and general throughout the city, and might safely under all the

circumstances be imputed not merely to the engineer, but to the city council as a whole, especially as no civic official past or present ventured into the witness box to impeach or deny such an inference. Then having such knowledge the plaintiffs were, I think, bound to act with reasonable promptness in claiming the forfeiture. Instead they permitted years to elapse during which as the plaintiffs must have known heavy expenditure by the Toronto Electric Light Co. was going on, an expenditure that would have been impossible but for the consent from time to time of the plaintiffs to the necessary openings being made in the city streets. There was thus in the plaintiffs' conduct much more than a mere passive acquiescence, something indeed under the circumstances I have mentioned amounting to an active encouragement to the defendants to think and believe that they the plaintiffs did not intend to claim the benefit of the forfeiture.

And for these reasons I think the inference of waiver drawn by the learned Chief Justice is the only proper one upon the whole evidence.

The appeal fails and should be dismissed with costs.

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[DIVISIONAL COURT.]

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BUCKE V. THE CORPORATION OF THE CITY OF LONDON.

Sept. 28.

*Assessment and Taxes—Superannuated Official of Dominion—Income—
Exemption of.*

The annual income allowed under the Superannuation Act R.S.C. 1886, ch. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion, is not exempt from municipal taxation.

Leprohon v. Corporation of Ottawa (1878), 2 A.R. 522, distinguished.
Judgment of the county court of Carleton reversed.

APPEAL from the judgment in an action in the county court of the county of Carleton.

The action was brought to recover back moneys paid to the defendants for taxes, and was tried before MAC TAVISH, Co.J., on March 14th, 1905.

R. V. Sinclair, for the plaintiff.

G. F. Henderson and *A. W. Greene*, for the defendants.

The plaintiff was assessed on an income of \$1,000, the amounts imposed being as follows: For the year 1898, \$21.00; 1899, \$22.36; 1900, \$24.00 and 1899, \$25.00. The only income the plaintiff had was a superannuation allowance of \$1,260 from the Dominion of Canada.

He had been for thirty-five years a civil servant of the Government of the Dominion of Canada, and retired in the year 1891, being granted the annual sum of \$1,260 as a superannuation allowance. On his superannuation he went to reside in London, Ontario, and was there assessed for the years 1898, 1899, 1901 and 1902 on income as mentioned. He claimed to be exempt from any tax or assessment on the ground that the said allowance was not income, or, in any event was not assessable, and paid the taxes so assessed against him for the several years under protest.

The county court Judge was of opinion that the case came within *Leprohon v. Corporation of Ottawa* (1878), 2 A.R. 522; and that the plaintiff was therefore entitled to

recover back the moneys so paid by him, and judgment was accordingly entered in his favour.

From this judgment the defendants appealed to the Divisional Court.

On September 26th the appeal was heard before BOYD, C., MEREDITH, and MAGEE, JJ.

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T. G. Meredith, K.C., for the appellants. The learned county judge decided wrongfully in holding that the plaintiff was not assessable on income for the amount of his superannuation allowance. He seemed to think he was bound by the case of *Leprohon v. Corporation of Ottawa*, 2 A.R. 522; but that case is quite distinguishable. The principle on which it was decided was that the income of a civil servant while actually employed in the service of the country was not assessable, as tending to impair such service. Here the plaintiff was superannuated and was no longer performing any service for the country. The amount paid him was a certain amount and which he had the right to claim. It is called "income" in the Superannuation Act, R.S.C. 1886, ch. 18, sec. 8, and properly comes within the definition of "income" under the Assessment Act. The authorities shew he was properly assessed: *McCulloch v. State of Maryland* (1819), 4 Wheat. 316; *Dow v. Black* (1875), L.R. 6 P.C. 272; *Lefroy on Constitutional Law*, pp. 674-6; *Clement on Constitutional Law*, 2nd. ed., p. 209; *Ex p. Wicks* (1881), 17 Ch. D. 70; *Ex p. Webber* (1886), 18 Q.B.D. 111.

R. V. Sinclair, for the respondent. The amount received by the plaintiff was in no sense "income." It was merely a bonus or gratuity. There was no legal obligation on the Government to grant it. In order to come within the definition of income there must be the legal right to demand it. The case of *Leprohon v. Corporation of Ottawa* is not distinguishable as is contended. The plaintiff still continued the servant of the Government, and the principle upon which that case was decided applies here. This case has been followed in the courts of Nova Scotia, New Brunswick and British Columbia: *Fillmore v. Colburn* (1881), 24 Nova Scotia, 292;

D. C. *Ex p. Owen* (1881), 20 New Bruns. 486; *Ackman v. Town of*
 1905 *Moncton* (1884), 24 New Bruns., 103; *Regina v. Bowell*
 BUCKE (1896), 4 B.C. 498.

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September 28. The judgment of the Court was delivered by BOYD, C.:—The chief reason lying at the root of the decision in *Leprohon v. Corporation of Ottawa*, 2 A. R. 522, was that local or provincial taxation of the salaries of Dominion officers had the effect of impairing the means and instrumentalities necessary for carrying on the functions of Federal Government.

It is manifest that such a ground of exemption does not cover the present tax where the officer has been superannuated and is no longer engaged in the active service of the Dominion. The diminution of his means by the imposition of the tax payable by all residents in the Province of taxable property does not, in any sense, affect the instrumentalities of Federal Government or the efficiency of the federal service; and there is no reason to extend the doctrine of *Leprohon's* case so as to justify the exemption of the income of a retired public officer from the annual tax levied by the municipality where he lives.

That this officer enjoys what is properly called "income" under the provisions of the Superannuation Act, R.S.C. 1886, ch. 18, sec. 8, I do not think is to be doubted. He receives the annual allowance of a fixed sum to which he has certainly equitable claims upon the Government when once it has been granted and he has retired on faith of its due payment. This character of the allowance brings it within the rule laid down in the cases cited of *Ex p. Wicks*, 17 Ch. D. 70 and *Ex p. Webber*, 18 Q.B.D. 111. These and other authorities are considered by this Division in *Stewart v. Jones* (1901), 1 O.L.R. 34.

The judgment cannot be supported and this is decided without at all invading what has been decided in the *Leprohon* case.

The appeal is allowed and the action dismissed. Much difference of opinion in the lower courts has existed on this subject and for this reason we give no costs.

G. F. H.

[DIVISIONAL COURT.]

WOOD v. ADAMS.

D. C.

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Sept. 28.

Contract—Illegality—Non-recovery Back of Money Paid and Cancellation of Notes—Impounding of Notes.

The Court will not intervene, at the instance of a party to an illegal contract, to enable him to obtain relief from the exigencies thereof.

W. having been threatened with a criminal prosecution for having sexual intercourse with a young girl under sixteen years of age, effected a settlement whereby cash payments were made and promissory notes given by him. On his death, he having in no way repudiated the settlement during his lifetime, his administrator brought an action for the recovery of the money paid and the cancellation of the notes:—

Held, that the action was not maintainable, but the notes having been filed in Court it was ordered that they being illegal and void on the ground of public policy should remain on the files until further order.

THIS was an action tried before ANGLIN, J., and a jury, at Stratford on 21st March, 1905.

J. P. Mabee, K.C., and *G. G. McPherson*, K.C., for the plaintiff.
A. M. Panton, for the defendant.

The action was brought by the plaintiff George Wood as the administrator of Thomas Wood, deceased, to recover certain sums of money, paid by the deceased to the defendant; and to restrain the parting with or transferring of certain promissory notes given by the deceased to the defendant, and that they should be declared null and void, and delivered up to the plaintiff to be cancelled.

The evidence shewed that the defendant, who was a school teacher, had for eleven years prior to May, 1893, resided in the township of Downie where he taught school. He and the deceased were neighbours and well known to each other. The defendant's daughter Mabel Irene Adams, stated she had known deceased as long as she could remember. The deceased was a bachelor. He died in October, 1904, intestate, the plaintiff being appointed administrator of his estate.

In May, 1903, the defendant went to Stratford where he has since resided.

On 4th July of that year the deceased was in Stratford. The defendant's daughter Mabel was going to pay a visit for a

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week to the family of a nephew of deceased's, John Wood, and it was arranged that the deceased should call for her and drive her out. He called about dusk, and was accompanied by a Mr. Homner McLennan, the school teacher who had succeeded the defendant at the Downie school. The daughter Mabel was at that time a little over fourteen years of age. According to the daughter's statement on arriving at Mr. McLennan's house he got out and they drove on, and that shortly before she reached her destination the deceased had sexual intercourse with her. They then drove on to the nephew's house where she got out and he drove on to his own place. The deceased had been drinking during the day and was slightly intoxicated when he left the defendant's house. The daughter stayed with the nephew's family during the week but said nothing of what had occurred, nor did she say anything on her return home until some days afterwards, when, on her mother observing that she had not had her usual monthly illness, questioned her when she told her of what had taken place with the deceased. The mother said she at once sent for her husband who immediately came home when she told him of what had occurred, and that he then spoke to the daughter who confirmed what the mother had told him. The father did nothing about it until the December following when he drove out to deceased's farm and taxed him with what he had done when defendant said the deceased admitted it, and asked if the matter could not be settled, that he thought the action was one that could be settled by damages out of court. That he was willing to pay damages. The defendant then said he would accept \$2,500 which deceased said he was willing to pay, and it was arranged that the defendant should meet him in Stratford, and they accordingly met at the Albion Hotel there when it was agreed that deceased should pay \$100 in cash, and give three promissory notes for \$300 each and one for \$1,500, making up the \$2,500; that they went to the office of the defendant's solicitor where the money was paid and the notes given. The notes were payable without interest.

It appeared that the daughter became unwell shortly after she had had the conversation with her mother and that she never became pregnant.

The defendant said that subsequently on making enquiries of a banker he found that the notes, being payable without interest, their actual value was \$513 below their face value; and he then wrote to the deceased the following letter:

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"Stratford, March 3rd, 1904.

"Mr. Thomas Wood.

"I am writing you to say that the arrangements I made with you are not approved by the person who was at the back of it, and for whose interests I acted. When I consented to your suggestions with regard to terms I presumed too much. I have endeavoured ever since to secure its acceptance, but in vain. In thus writing you I feel that I am not making a departure from original contract or committing a breach of faith. The acceptance of your terms was a departure from original contract, because amount named certainly meant value at present time. I have made an effort to convert your paper into legal tender at bank with result that I find that the best present value I can procure is \$513 less than face. Now I am instructed to inform you that you have not kept to the first arrangement until you have negotiated for this difference between original arrangement and present value, either by immediate provision or its equivalent. Now you do not need to consider this as a hold up, because it would be more agreeable to me to call everything off and let the law take its course if you prefer that to the fulfilment of original agreement.

"I shall expect an immediate reply.

(Signed)

"W. A. ADAMS."

Upon the receipt of the letter the deceased saw defendant, when deceased paid him the \$513 and defendant gave a receipt therefor.

The defendant admitted that there were misstatements in his letter, that there was no one at the back of the matter whose approval was necessary, nor from whom he had received instructions; and that he had not attempted to secure any one's acceptance of the agreement, but that the statements contained in the letter were made so as to mislead any third person into whose hands it might accidentally fall, but that the deceased would understand what was meant.

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The plaintiff claimed that the moneys and notes were paid and given without any consideration and to stifle a threatened criminal prosecution, the daughter being under the age of 16 years.

Questions were submitted to the jury, which with their answers, were as follows :

1. Did Thomas Wood, deceased, have sexual intercourse with Mabel Irene Adams on the 4th July, 1903 ? A. Yes.

2. If so, was such connection had with the girl's consent ? A. Yes.

3. If the answer to question number 2 be "yes," was such consent given with knowledge of the nature and quality of the act ? A. Yes.

4. Was Mabel Irene Adams pregnant by Thomas Wood ? A. No.

5. If Thomas Wood had connection with Mabel Adams did any illness of the girl follow that act, caused by it, and which affected or diminished her ability to serve her father ? A. No.

6. Did W. A. Adams believe that Thomas Wood had committed an actionable wrong on the person of Mabel Irene Adams, entitling the father to damages ? A. Yes.

7. Did Thomas Wood so believe ? A. Yes.

8. Was there any agreement or understanding between Adams and Thomas Wood that if Wood gave the money and notes in question Adams would refrain from taking criminal proceedings against Wood ? A. Yes.

9. Did the defendant Adams make any misrepresentation to the deceased Thomas Wood which induced him to give the \$100 and the notes on the 19th December, 1903 ? A. No.

10. If so, what misrepresentation did he so make ? No answer.

11. Did the defendant Adams make any misrepresentation to the deceased Thomas Wood which induced him to pay the \$513 in March, 1904 ? A. Yes.

12. If so, what misrepresentation did he so make ? A. By inferring in his letter of March 3rd, 1904, that there was some one else at the back of it ; also his statement that he preferred to let the law take its course.

13. Was payment of the \$513 induced by any threat by Adams to take criminal proceedings? A. Yes.

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The learned Judge upon the findings of the jury entered judgment for the plaintiff for the return of the notes and the payment of the two sums of money, with interest, and costs of the action.

From this judgment the defendant appealed to a Divisional Court.

On September 25, 1905, the appeal was heard before BOYD, C., MEREDITH and MAGEE, JJ.

Aylesworth, K.C., and *A. M. Panton*, for the appellants. When the settlement was made the only matter discussed was the seduction, and the amount to be paid as damages for the seduction. The daughter at first said something about its having been against her will, but she finally admitted she was a consenting party. The deceased was well known in the community and was anxious to settle the claim and avoid publicity. There was sufficient evidence of loss of service. No doubt a criminal charge might have been preferred under what is known as the Charlton Act, now sec. 181 of the Code, 55-56 Vict. ch. 29 (D). A valid settlement of the civil action could be made, notwithstanding the existence of the criminal offence: *Fisher v. Apollinaris Co.* (1875), L.R. 10 Ch. 297; *London and County Banking Co. v. London and River Platte Bank* (1888), 21 Q.B.D. 535; *Ward v. Lloyd* (1843), 6 M. & G. 785; *Flower v. Sadler* (1882), 10 Q.B.D. 572; *Keir v. Leeman* (1846), 9 Q.B. 371. Nothing can be made out of the alleged misstatements in the letter of March 3rd; the defendant explained why they were made, which the deceased thoroughly understood. The money paid in response to that letter was clearly a voluntary payment. There is no evidence of any threat ever having been made, or even suggested, that a criminal prosecution would be brought, and the onus is on the plaintiff to prove that a criminal prosecution was threatened; but even if the money was paid and the notes given to stifle a criminal prosecution, the parties were *in pari delicto*, and, therefore the plaintiff cannot maintain the action: *Taylor v. Chester* (1869), L.R. 4 Q.B. 309,

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313; *Kearley v. Thompson* (1890), 24 Q.B.D. 742; *Flower v. Sadler* (1882), 10 Q.B.D. 572.

J. P. Mabee, K.C., for the respondents. There was ample evidence to go to the jury that the foundation of the settlement was the threat to prosecute for the criminal offence. This is quite apparent from the letter of March 3rd for what other meaning could be given to the words that the law might take its course. This is not the expression that would be used with reference to a civil action. There was, moreover, nothing on which a civil action for seduction could be based. There was no loss of service, no illness or pregnancy. The money having been paid and the notes given to prevent the laying of the criminal charge the plaintiff has the right to recover them back. The cases in which it has been held that there can be no recovery is where a party is suing on the security. The parties cannot be said to be *in pari delicto* for pressure was used; the deceased was forced to settle, as it were, at the point of the sword: *Peoples' Bank of Halifax v. Johnson* (1892), 20 S.C.R. 541; *Leggatt v. Brown* (1898), 29 O.R. 530; *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587, [1892] 1 Ch. 173.

September 28. The judgment of the Court was delivered by BOYD, C.:—The findings of the jury are that there was sexual intercourse between the deceased and the daughter of the defendant with her consent, she being under sixteen years of age, and over fourteen in July, 1903, and that the father and the deceased believing that there had been an actionable wrong committed on the girl agreed to settle that and all criminal proceedings in respect of the transaction for four promissory notes and \$100 in cash. They also find that a subsequent payment of \$513 was made in response to letter written by defendant in March, 1904, in which there was misrepresentation in alleging that there was some one else at the back of it, and also that it was proposed to let the law take its course. They also add in answer to a question that this payment was induced by Adams' threat to take criminal proceedings against Wood.

The deceased died in October, 1904, without any attempt to recede from the settlement, and this action to recover all

the money paid and the notes is brought by his administrator. The plaintiff's own case alleges that the transaction was entered into to stifle a prosecution, and I cannot see that any valid separation can be made between the first payment of money and the last payment to be made. The first payment of money and the giving of the notes were unquestionably parts of one dealing, and the payment of the \$513 was supplementary to that. The pleadings do not make a case of misrepresentation such as found by the jury. The misrepresentation alleged was not proved. The misrepresentation proved was not of material character going to the root of the dealing. No evidence of pressure or undue influence has been alleged or proved as found by the jury. That the last payment is said to be the outcome of a threat to prosecute does not carry the legal aspect of the payment beyond the first apparently willing payment so far as relief in the court is concerned. The law laid down by Wilmut, C.J., in *Collins v. Blantern* (1767), 2 Wils. 347, at p. 350, is still the rule in all courts and it stands thus : "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a court to fetch it back again;" and the rule is the same as to securities, *e.g.*, promissory notes, handed over in pursuance of such a contract as was pointed out by the judges in *Atkinson v. Denby* (1861), 6 H. & N. 778, at pp. 782 & 786. There is nothing to indicate in this case that the actors were not *in pari delicto*: no finding and indeed no evidence to warrant any such finding. It is enough to disqualify either party from seeking the intervention of the court if the agreement was induced by threats of a prosecution, and if fear of that prosecution be the dominating influence in leading to the giving of the money and the securities. The whole subject is explained by the Judges in *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 173, but the first report of that case in [1891] 2 Ch. 587, as digested in the head note, is apt to mislead. The case was one of consolidation of common law and chancery actions; in which at law the plaintiff sought to enforce the illegal securities (notes) and the action in equity was in aid of the defence at law. But it is plainly laid down by Lindley, C.J., at p. 182, that "a plaintiff is not entitled to relief in a court of equity on the ground of the

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illegality of his own conduct. In order to obtain relief in equity he must prove not only that the action is illegal, but something more; he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and shew pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity, although the transaction may be illegal upon the ground that it is meant to stifle a prosecution." And in that case the plaintiff in the chancery action—occupying the same status as this plaintiff had his action dismissed with costs. But on the submission of the defendant's counsel who said that if they could not recover on the promissory notes they did not resist the claim of the plaintiff to have them delivered up—the court ordered them to be delivered over to the makers.

This action on the merits fails—the plaintiff has done no more than shew that the deceased whom he represents entered into an illegal bargain for the sake of stifling a criminal prosecution against himself and answering in damages for the supposed and believed actionable wrong. The deceased has had during his life the benefit of what he bargained for; his death has emphatically closed the transaction so that it cannot be deemed executory even as to outstanding notes. He himself could not have undone the concluded agreement and his personal representative occupies no higher stand: see *Re Mapleback, Ex. p. Caldecott* (1876), 4 Ch. D. 150, as compared with and explained by *Ex. p. Wolverhampton Banking Co., Re Campbell* (1884), 14 Q.B.D. 32; and see also *McClatchie v. Haslam* (1891), 17 Cox C.C. 402.

The case in the Supreme Court of *Peoples' Bank of Halifax v. Johnson*, 20 S.C.R. 541, was one where the holder of the illegal instrument came into court to enforce it and failed.

The promissory notes were put in and filed at the trial, the defendant pleading that they were good and valid securities. We find the contrary to be the case—they are on the ground of public policy illegal and void, and they should remain on the files of the Court till further order.

There will be no costs of this action or appeal.

MEREDITH and MAGEE, JJ., concurred.

G. F. H.

[IN CHAMBERS.]

MCWILLIAMS v. DICKSON CO. OF PETERBOROUGH.

1905

Oct. 7.

*Discovery—Examination of Officer of Company Party—Refusal to Answer—
Remedy—Master in Chambers.*

The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination for discovery, nor to order him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer.

Badgerow v. Grand Trunk R.W. Co. (1889), 13 P.R. 132, and *Central Press Association v. American Press Association* (1890), *ib.* 353, applied and followed.

MOTION by the plaintiff to strike out the statement of defence, on the ground of the refusal of J. C. Shook, the general manager of the defendants, an incorporated company, to answer certain questions upon being examined for discovery as an officer of the company.

The motion came on for hearing before the Master in Chambers on the 5th October, 1905.

A. R. Clute, for the plaintiff.

Grayson Smith, for the defendants, contended that there was no power to strike out the statement of defence of an incorporated company for refusal of an officer to answer questions, citing *Badgerow v. Grand Trunk R.W. Co.* (1889), 13 P.R. 132.

THE MASTER IN CHAMBERS directed that the notice of motion should be amended *nunc pro tunc* so as to change the motion to one for an order requiring J. C. Shook to attend again for examination at his own expense.

The amendment was made, and the motion was heard on the 6th October, 1905, the same counsel appearing.

October 7. THE MASTER IN CHAMBERS:—On the motion coming before me on the second occasion, it was objected that there was no power given to the Master in Chambers to make any such order where a corporation is a party to an action. The argument was, that the first sentence of Con. Rule 454* alone applies to that case, and that the remedy, if any, is by motion to commit.

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Being of opinion that this was correct, I reserved judgment to consider the point, and having done so, I think the point well taken.

In Holmested and Langton's Judicature Act, p. 622, the learned authors seem to agree with this view.

Mr. Clute attempted to distinguish *Badgerow v. Grand Trunk R.W. Co.*, 13 P.R. 132, and *Central Press Association v. American Press Association* (1890), *ib.* 353, on the ground that in those cases the officers refused to attend; but this does does not seem a substantial difference.

It would be obviously inconvenient and against the whole policy of the Judicature Act that an argument should be heard before the Master in Chambers which could not be the basis of any relief to the plaintiff. If he decided that the questions should be answered and directed the officer to attend and answer (I am not, however, deciding that there is any power to do so), and if the officer still refused, a motion must then be made to the Court, where the whole matter must be gone over again.

I do not think that Con. Rule 455† helps the plaintiff.

It is, therefore, reasonably plain that the plaintiff in the present case has misconceived his remedy, and must apply to commit Mr. Shook if any further information is really desired.

The motion must be dismissed with costs to the defendants in any event.

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*454. Anyone refusing or neglecting to attend at the time and place appointed for his examination, or refusing to be sworn or to answer any lawful question put to him by the examiner or by any party entitled so to do, or his counsel, solicitor or solicitor's clerk, shall be deemed guilty of a contempt of Court, and proceedings may be forthwith had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed; and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended; and the party examining may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

†455. If any one under examination objects to any question put to him, the question and the objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the office of the Court where the pleadings are filed to be there filed; and the validity of such objection shall be decided by the Court or a Judge; and the costs of and occasioned by such objection shall be in the discretion of the Court or Judge.

[IN CHAMBERS.]

C. v. D.

1905

Oct. 12.

Executors and Administrators — Action — Criminal Conversation — Death of Plaintiff — Revivor — Trustee Act, sec. 10 — Appeal to Court of Appeal — Issue of Order from High Court — Indorsement — Rule 399.

The provisions of sec. 10 of the Trustee Act, R. S. O. 1897, ch. 129, apply to an action for criminal conversation; and where the plaintiff dies *pendente lite* the action may be continued in the name of his personal representative.

Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice.

The absence of the indorsement on the order of revivor required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time.

THIS action, which was for criminal conversation, was on the list for hearing by the Court of Appeal on appeal by the defendant and cross-appeal by the plaintiff from the judgment of a Divisional Court, 8 O.L.R. 308, when the plaintiff died, on or about the 27th April, 1905. Letters of administration to the estate of the plaintiff were granted on the 21st September, 1905, to his brother, who on the 27th September took out a *præcipe* order in the High Court directing the action to proceed in his name as plaintiff by revivor.

On the 4th October, 1905, the defendant gave notice of a motion to set aside the order of the 27th September.

The motion was heard by the Master in Chambers on the 10th October, 1905.

C. W. Kerr, for the defendant.

W. R. Smyth, for the plaintiff by revivor.

October 12. THE MASTER IN CHAMBERS:—The grounds of the motion were three.

First, because Con. Rule 399 was not complied with, as a memorandum according to Form 51 * was not indorsed upon the order.

* No. 51. Indorsement on order adding or changing parties. (Rule 399.) Take notice that if you desire to discharge this order you must apply to the Court for that purpose within 14 days after the service hereof upon you. . . .

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Inasmuch as the present motion has been made, this objection does not seem substantial. If necessary, leave should be given to amend *nunc pro tunc*.

Second, because the order was issued from the High Court, whereas it should have been issued from the Court of Appeal, as the case is now before that Court.

In support of this proposition, Mr. Kerr relied on *Huntington v. Attrill* (1892), a decision of the Judicial Committee, cited in Holmsted and Langton's *Judicature Act*, p. 604. This might seem to conflict with *Grasett v. Carter* (1884), 6 O.R. 584, 588, where the Chancellor said in a similar case: "The revivor should still be in the Court below, because the appeal is but a step in the cause, and there is no machinery in the Court of Appeal for reviving suits." This decision I am bound to follow, without venturing to say that the Privy Council have not power to make such an order if they see fit to do so.

Third, the most serious objection was that sec. 10* of the Trustee Act, R.S.O. 1897, ch. 129, does not apply to such a case as this.

This cannot succeed unless the case of *Mason v. Town of Peterborough* (1893), 20 A.R. 683, can be distinguished. The very wide words of sec. 10 are limited only by the words, "except in cases of libel and slander," and the rule of *mentio unius exclusio alterius* seems to require that even the present action be held to come within the enabling words.

It was argued that sec. 12† was to be taken as a test of

* 10. The executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander, in the same manner, and with the same rights and remedies as the deceased would, if living, have been entitled to do; and the damages when recovered shall form part of the personal estate of the deceased; but such action shall be brought within one year after his decease.

† 12. In estimating the damages in any action under either of the next preceding two sections, the benefit, gain, profit or advantage which, in consequence of or resulting from the wrong committed, may have accrued to the estate of the person who committed the wrong, shall be taken into consideration, and shall form part, or may constitute the whole, of the damages to be recovered, and whether or not any property, or the proceeds or value of property, belonging to the person bringing the action or to his estate, has or have been appropriated by or added to the estate or moneys of the person who committed the wrong.

the cases to which sec. 10 applies; and that, as sec. 12 could have no application to the present, so neither had sec. 10.

But sec. 12 seems rather intended to facilitate the assessment of damages in cases under secs. 10 and 11, and not to have the effect now contended for; and to that contention I do not yield.

The motion must be dismissed with costs to the plaintiff in any event.

E. B. B.

[IN CHAMBERS.]

WOODS V. FADER ET AL.

1905

Contempt of Court—Disobedience of Subpoena—Service—Necessity for Shewing Original.

Sept. 2.

To bring a person into contempt for disobedience of a subpoena, it must be proved that the original writ was shewn at the time of service, as well as that a copy was delivered to and left with the person.

MOTION by the plaintiff to commit the defendant Fader for non-attendance for cross-examination on his affidavit filed in opposition to a motion by the plaintiff for an interlocutory injunction. The facts are stated in the judgment.

The motion was heard by MAGEE, J., in Chambers, on the 31st August, 1905.

J. E. Day, for the plaintiff.

G. Grant, for the defendant Fader.

September 2. MAGEE, J.:—The affidavit of service of the subpoena and copy of appointment does not shew that either the original subpoena or appointment was shewn to the defendant, but merely that a copy was delivered to and left with him.

In cases where a person is liable to attachment for disobedience to the order or process of the Court, personal service is necessary, and the original document which he is to obey must be shewn to him when the copy is served, if it is intended to hold him liable for contempt, unless where dispensed with by the Court: Daniell's Chancery Practice, 5th ed. p. 905; Snow's Annual Practice, 1905, p. 630; and good service must be truly and fully proved: Daniell, pp. 793-4; and see *McLean v. Bruce* (1888), 12 P.R. 602.

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Consolidated Rule 333 dispenses with the shewing of original writs, orders, etc., unless demanded, and except in cases of arrest or attachment. This Rule is founded on Rule 165 of H.T. 1853 in England, now embodied in Supreme Court Rule 1012 (O. 67, r. 1) of 1883, which referred to rules and orders, and made exception "in cases of attachment."

The mode of service of a subpoena is in England prescribed by Supreme Court Rule 514 (O. 37, r. 32) of 1883, which directs that it be effected by delivering a copy and at the same time producing the original writ. This was the old practice at common law. Archbold's Q.B. Prac. 12th ed. (1866), p. 350, says that a copy of the subpoena must be personally served and left with the witness, and at the same time the subpoena must be produced and shewn to him, and this whether he requires to see it or not. In Chancery the practice was the same: Daniell's Chancery Practice, 5th ed., p. 803.

Taylor on Evidence, 9th ed., p. 816, sec. 1244, referring to Rule 514, already mentioned, says: "The provision which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons." In *The King v. Sloman* (1832), 1 Dowl. 618, on application for attachment for not obeying a subpoena, Bayley, B., says: "When you move for an attachment, you must shew the original." And again, "There are cases where the original need not be shewn; but it is different where a party is to be brought into contempt."

The order must, on this ground, be refused, and with costs.

The defendant alleges that the copy of the appointment served on him did not contain the name of the examiner, but no affidavit of that fact is filed, so that the defendant cannot avail himself of that objection.

It is not necessary to consider the defendant's contention that under the combined effect of Rules 490, 492, and 439 (b) (1250), such cross-examination could not be had in long vacation—as to which counsel for the plaintiff cited *Anderson v. Thorpe* (1866), 12 Gr. 542; *Miller v. Spencer* (1890), 13 P.R. 478; *Hogaboom v. Cox* (1892-3), 15 P.R. 23, 127.

E. B. B.

[IN CHAMBERS.]

ADAMS V. SUTHERLAND.

1905

JOSH V. SUTHERLAND.

Oct. 9.

Arrest—Ca. Re.—Special Bail—Relief under Rule 1047—Waiver—Discharge of Bail.

The defendant was arrested under an order in the nature of a *ca. re.*, and was released from close custody upon giving special bail by the deposit of a sum of money with the sheriff:—

Held, that he had not thereby waived his right to be relieved under Con. Rule 1047; and, it appearing, upon the material filed upon a motion under that Rule, that the order for arrest should not have been made, an order was made for the return to him of the sum deposited.

MOTION in each action by the defendant, under Con. Rule 1047,* for an order for his discharge from custody under an order for arrest in the nature of a *ca. re.*, and to set aside the order. The facts are stated in the judgment.

The motion was heard by ANGLIN, J., in Chambers, on the 6th October, 1905.

Grayson Smith, for the defendant.

R. McKay, for the plaintiffs.

October 9. ANGLIN, J.:—Upon the material now before me, I am satisfied that no order for the arrest of the defendant would be made. The evidence establishes that the defendant was, when arrested in Canada, *en route* from Australia to England—was merely passing through this Province. It also leaves the plaintiffs' causes of action open to grave doubt. I cannot conceive that from this material, as it now stands, the inference that the defendant was about to leave Ontario with intent to defraud, could fairly be drawn.

But it is urged that by putting in special bail, by the deposit of a sum of money with the sheriff, in order to avoid detention in close custody under the *ca. re.*, the defendant has

* 1047. A person arrested upon an order for arrest may apply to the Court or a Judge for an order that he be discharged out of custody; and the Court or Judge, subject to appeal, may make such order thereon as may seem just;

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waived his right to be relieved from the operation of the order for his arrest, and that, because not actually in close custody, he can claim no relief under Con. Rule 1047.

For the protection of the sheriff, who has acted under it, the order for arrest should not now be set aside: *Jury v. Jury* (1895), 16 P. R. 375. But I find nothing in the fact that the defendant has given bail disentitling him to the benefit of Con. Rule 1047. Upon the application of a person arrested under an order for arrest, that Rule enables the Court or a Judge to make such order as may seem just. A defendant is not obliged to endure the hardship of lying in prison until he can apply to the Court for his discharge, at the peril of being held to have submitted to the order for his arrest, should he give bail to obtain his release from actual confinement: *Ross v. Balfour* (1839), 5 O.S. 683; *McGuffin v. Cline* (1865), 4 P.R. 134.

This defendant is, in my opinion, entitled to be relieved under the provisions of Con. Rule 1047. There will, accordingly, be an order for the return to him of the moneys deposited as security by him, or on his behalf, with the sheriff of the county of Lambton.

The costs of these motions will be costs to the defendant in any event of these actions, unless the Judge presiding at the trials may otherwise order.

T. T. R.

[IN THE COURT OF APPEAL.]

SCHWOOB V. MICHIGAN CENTRAL R.W. CO.

C. A.

1905

*Negligence—Master and Servant—Defect in Machinery—Workmen's
Compensation Act.*

Nov. 13.

AN appeal by the defendants from the order of a Divisional Court, 9 O.L.R. 86, setting aside a nonsuit and directing a new trial, was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 29th September, 1905.

I. F. Hellmuth, K. C., and *D. W. Saunders*, for the defendants.

T. W. Crothers, for the plaintiff.

November 13. THE COURT gave judgment agreeing that a new trial was properly directed, and dismissing the appeal.

E. B. B.

[DIVISIONAL COURT.]

D. C.

1905

Nov. 13.

SLATER V. LABOREE.

*Bills of Exchange—Endorsement by Third Party without Endorsement by Payee
—Valuable Consideration—Liability.*

The defendant became the endorser of two promissory notes without the payees having endorsed same, being so endorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should endorse them and become liable thereon ;—

Held, that the defendant was liable.

Robinson v. Mann (1901), 31 S.C.R. 484 followed.

Steele v. McKinlay (1880), 5 App. Cas. 754, and *Jenkins v. Coomber*, [1898] 2 Q.B. 168, not followed.

It is the duty of the Courts of the Province to follow the decision of the highest Court in Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases.

APPEAL by the defendant from the judgment of the first division court in the county of Carleton, pronounced by the junior Judge of the county court of that county, in favour of the respondents.

The action was brought by the payees of two promissory notes made by the Dominion Supply Company, Limited, payable to the order of the respondents and indorsed by the appellant, but not by the respondents, to recover payment of the notes.

The notes were indorsed by the appellant before they were delivered to the respondents and were so indorsed in pursuance of an agreement for valuable consideration that the appellant should indorse and become liable as indorser.

From the judgment the defendant appealed to the Divisional Court.

On November 10, 1905, the appeal was heard before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

A. J. Russell Snow for the appellant. The plaintiffs cannot sue the defendant on the note as endorsed. The note was made payable to them, and they have not, as payees, endorsed it, so that no title to the note ever passed to them. This point has been expressly decided by the House of Lords: *Steele v. McKinlay* (1880), 5 App. Cas. 754. See also *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Bank of Commerce v. Perram*.

(1899), 31 O.R. 116; *Small v. Henderson* (1899), 27 A.R. 504; *Duthie v. Essery* (1895), 22 A.R. 193; Girouard on Bills of Exchange, p. 185 *et seq.* The junior Judge of the division court held that he was bound by *Robinson v. Mann* (1901), 31 S.C.R. 484, and so found for the plaintiffs, but that case is distinguishable. The real point in that case was whether the consideration was properly stated in the chattel mortgage given there. But, even if *Robinson v. Mann* should decide the point in question here, this Court is bound by the judgments in the House of Lords case.

W. E. Middleton for the respondents. The division court Judge was right in holding that he was bound by the decision of our Supreme Court in *Robinson v. Mann*, 31 S.C.R. 484. The effect of the endorsement of the note by the defendant was the real point in question, for unless there was a valid endorsement there was no consideration for the mortgage upon which the plaintiffs agreed to withhold proceedings. The endorsement of the note here was the consideration for the taking of the note. The bill was completed and the plaintiffs were holders in due course. The case in the House of Lords does not apply as the decision was based on the English Act which is different from ours; but, even if it did apply, our Court must be governed by the judgment of our Supreme Court. There is no question that the defendant is liable in equity and good conscience for that is the principle on which judgments of the division court are based. Moreover the note can be reformed so as to carry out the intention of the parties.

November 13, 1905. The judgment of the Court was delivered by MEREDITH, C.J.:—It was contended by the appellant in the Court below and before us that the case was governed by the principle of such cases as *Steele v. McKinlay* (1880), 5 App. Cas. 754; *Jenkins v. Coomber*, [1898] 2 Q.B. 168; *Canadian Bank of Commerce v. Perram*, 31 O.R. 116; and that the respondents were not entitled to recover for the reasons which led to its being held in those cases that the indorser had incurred no liability to the persons who sought to recover from him. This contention was not, however, successful, for the learned Judge of the division court

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held that he was bound to follow the decision of the Supreme Court of Canada in *Robinson v. Mann*, 31 S.C.R. 484, and he accordingly gave judgment for the respondents.

We are of opinion that the learned Judge was right in following *Robinson v. Mann*, which is an express and the latest decision on the very point raised by the appellant.

It was not for the learned Judge, nor is it for us to question whether a decision of the highest Court in Canada is in accordance with the previous cases. It is our duty, as it was his, to follow it.

I would therefore dismiss the appeal with costs.

G. F. H.

[IN THE COURT OF APPEAL.]

IN RE TATE AND THE CITY OF TORONTO.

C. A.

1905

Nov. 13.

Highway—Closing Highway—Property Injuriouly Affected—Municipal Corporations—Municipal Act, 1903, sec. 437.

A property on the west side of a street running north and south was held to have been "injuriously affected" within the meaning of sec. 437 of the Municipal Act, 1903, by the closing of a street running from the first street in an easterly direction opposite the property in question and an award of compensation by the official arbitrator to the owner of the property was upheld, the principle of *Metropolitan Board of Works v. McCarthy* (1867), L.R. 7 H.L. 243, being applied.

APPEAL by the city of Toronto from the award of the official arbitrator, James A. Proctor, Esquire, in favour of the claimant.

The claimant was the owner of a house situated on the west side of Manning avenue in the city of Toronto. The city in the exercise of its powers in that behalf closed a street called Herrick street, which, as laid down in the plan of the locality, ran from the east side of Manning avenue in an easterly direction to and across Bathurst street, the starting point on Manning avenue being directly opposite the claimant's house. Herrick street had not been graded or paved but could be used by foot passengers and to a limited extent for vehicles. The claimant could without using Herrick street reach Bathurst street by going a comparatively short distance either north or south on Manning avenue from his house to other cross streets. The official arbitrator held that the closing of Herrick street injuriously affected the value of the claimant's house and awarded him \$200 damages.

The appeal was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW and MACLAREN, JJ.A., on the 2nd October 1905.

J. S. Fullerton, K.C., for the appellants. There has been no interference with the access to the claimant's property and no special injury to it, and the allowance of damages is improper. The learned arbitrator has based his finding mainly on the

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converse principle that in proceedings under the local improvement clauses to open a street property which does not abut on the new street may be and generally is assessed for part of the cost, but that is done on the principle that there is general benefit to the property in the neighbourhood. In the case of the closing of a street general inconvenience to all the property in the neighbourhood is not enough; there must be some specific and direct interference with the enjoyment of the claimant's property. The statutory right is merely substituted for the previously existing right of action and clearly on the facts here an action would not lie; *The King v. McArthur* (1904), 34 S.C.R. 570.

J. H. Denton, for the respondent. The closing of the street is a direct interference with the enjoyment of the claimant's property; the right of egress therefrom is directly affected and made far less convenient, and the light, air and view will be to an appreciable extent obstructed. The case is within the principle of the decisions under the Lands Clauses Consolidation Act, such as *Metropolitan Board of Works v. McCarthy* (1874), L.R. 7 H.L. 243; *Caledonian R.W. Co. v. Walker's Trustees* (1882), 7 App. Cas. 259; *Beckett v. Midland R.W. Co.* (1867), L.R. 3 C.P. 82; and *Chamberlain v. West End of London R.W. Co.* (1862), 2 B. & S. 605. The argument based on the practice adopted under the local improvement clauses is a most convincing one; if by the opening of a street there is benefit, surely by its closing there is injury.

Fullerton, in reply.

November 13. The judgment of the Court was delivered by OSLER, J.A.:—This was an appeal by the city from the award of the official arbitrator, Mr. James A. Proctor, adjudging that the complainant was entitled to and awarding him the sum of \$200 as compensation for the closing of part of Herrick street opposite to his property under by-law No. 4374.

The defendants contended that by the closing of Herrick street the plaintiff suffered no damage more than the rest of the King's subjects and therefore that his property was not injuriously affected thereby so as to entitle him to compensation under sec. 437 of the Municipal Act, 1903.

The plaintiff's property is situate on the west side of Manning avenue, a street running north and south between Queen street and the north city limits. It also fronts the western terminus of Herrick street, a street running east and west between Manning avenue and Borden street and crossing Bathurst street on which there is a street car line.

By their by-law the defendants closed Herrick street from the east side of Manning avenue to the west side of Euclid avenue, the next north and south street east of Manning avenue thus depriving the complainant of his access to Herrick street from his property across Manning avenue and *e converso*.

The learned arbitrator was of opinion and found upon the evidence submitted by both parties that the loss of access to and from the plaintiff's property by Herrick street injuriously affected and depreciated it in value to the extent of the sum awarded. The amount is not disputed but it is said that the principle on which it was awarded is wrong inasmuch as the plaintiff's property does not directly front or abut upon Herrick street and access to and from the property by Manning avenue is not interfered with. That, however, is not the question. The question is whether having regard to the situation of the property in relation to Herrick street the stopping of access to the street can be said to be something which injuriously affects it, whether it is an injury or damage peculiarly affecting the land itself which does directly front upon Herrick street and access to and from which by way of that street was always obtainable by crossing Manning avenue, a street which as regards the property merely lies between it and Herrick street.

Sec. 437 of the Municipal Act, 1903, enacts that every council shall make to the owners or occupiers of, or other persons interested in, real property entered upon . . . or injuriously affected by the exercise of its powers due compensation for any damages . . . necessarily resulting from the exercise of such powers, beyond any advantage which the claimant may derive from the contemplated work. This clause comes from sec. 373 of the Municipal Act, 1903, which was considered in the case of *Yeomans v. Wellington* (1878), 43 U.C.R. 522, (1879), 4 A.R. 301, in which the cases which had arisen under English legislation of a similar character were examined and applied.

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In *Mayor of Montreal v. Drummond* (1876), 1 App. Cas. 384, a case turning upon a Quebec statute which made no express provision for compensation for damage which might be caused by acts which it authorized to be done, Sir Montague Smith, speaking of the right to compensation usually provided for by legislation authorizing the expropriation of property or the commission of acts by which it is injuriously affected, said (p. 410): "In practice it is generally provided in respect of all acts by which lands are 'injuriously affected,' words which have been held by judicial interpretation of the highest authority to embrace only such damage as would have been actionable if the work causing it had been executed without statutory authority." One of the cases referred to is no doubt the case of *Metropolitan Board of Works v. McCarthy*, L.R. 7 H.L. 243, 253; and the later case of *Caledonian R.W. Co. v. Walker's Trustees*, 7 App. Cas. 259, 276, may also be noted.

Tried by that test the plaintiff's right to some measure of compensation seems reasonably clear and I think the case is not in principle distinguishable from the McCarthy case. In that case the plaintiff had carried on his business near a public dock known as Whitefriars' Dock, a draw-dock about 352 feet in length leading into the river Thames, and by reason of its proximity to the plaintiff's premises, from which its head was only 20 feet distant, and the access given thereby to and from the Thames, the premises were rendered more valuable to sell or occupy with reference to the uses to which any owner might put them. A solid embankment was carried along the foreshore of the Thames by which the dock was permanently stopped up and destroyed and of course all access through it to the river was put an end to. It was contended by the defendants that the plaintiff having no easement, his property not immediately adjoining the dock, had nothing but the power of using it which he enjoyed in common with all the Queen's subjects, and therefore was not entitled to compensation. The 20 feet referred to as intervening between the dock and the plaintiff's premises appears from the judgment to have been part of another highway, and the Lord Chancellor (Lord Cairns) says that the case appears to him to amount to this: "The occupier or tenant of a house has got in front of his

house two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him—the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever, or for whatsoever purpose, that property may be occupied." He goes on to say that he thinks the case "analogous to the case of *Beckett v. Midland R.W. Co.*, L.R. 3 C.P. 82, in which there was, in front of the premises in question in that case one single highway, the farther half, or the farther third portion of which was taken off and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question; and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed."

And in the same case Lord Hatherley says: "It would make no difference, that upon one side of his (the plaintiff's) house there had been a road which he had a right to use for the purpose of access to his house for whatever purpose he occupied it, and this dock had been on the other side of his house, and he had been accustomed to use it for the purposes for which he occupied his house; then he would have two accesses in fact, a water access on one side of the house and a land access on the other. I think that there can be no doubt that the taking away one of these approaches would have been actionable at law, and that if it was done under a private Act his property would have been 'injuriously affected' under the Lands Clauses Consolidation Act. Now the circumstance of this water access, as distinguished from the land access, lying immediately on the other side of the house from that which I have supposed, that is to say, its lying on the same side of the house as the land access, can, I think, make no substantial difference in the case."

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The observations of Lord Penzance at pp. 263-4, are useful in considering when the claim for compensation may be regarded as substantial and when it ceases to be so.

In the case before us we have two highways—it can make no difference that they happen to be highways by land—in front of the plaintiff's premises though one of them lies alongside of or abuts upon the other, corresponding to those with which the Court was dealing in the *McCarthy* case, viz., the way across Manning avenue and Herrick street, these two affording access from and to the premises by the latter street from and to highways to the east such as Bathurst street, and in closing that street the plaintiff was as regards his property placed in a situation similar to that in which the plaintiff in the *McCarthy* case was placed by the closing of the dock.

The case was thus reduced to one of the *quantum* of the compensation—to what extent or in what degree the property had been injuriously affected. From its situation in regard to Herrick street it enjoyed some advantage, not perhaps a very great one, over all other properties in the neighbourhood, and of the value of this the arbitrator took a fairly moderate and reasonable view. I refer also to *Beckett v. Midland R.W. Co.*, L.R. 3 C.P. 82; *Chamberlain v. West End of London R.W. Co.*, 2 B. & S. 605; S.C. in error, p. 617; and *Caledonian R.W. Co. v. Walker's Trustees*, 7 App. Cas. 259, at p. 303.

In re McArthur and Southwold (1878), 3 A.R. 295, shews that the right to compensation is not confined to the case when by closing the road a person is excluded from ingress and egress to and from his lands or place of residence over such road, that is, as I take it, actual direct ingress and egress to and from the road. That is a case specially provided for by sec. 629. In a case of that kind some other convenient road or way of access to the lands or residence must be provided by the council, but the right to compensation must be followed up and established by the proper proceeding under sec. 438: see *per* Burton, J.A., at p. 299, and Patterson, J.A., at pp. 302, 304, 305.

I have read the case of *The King v. McArthur*, 34 S.C.R. 570, but I do not think it governs the case before us.

The appeal must therefore be dismissed with costs.

R.S.C.

[IN THE COURT OF APPEAL.]

CITY OF TORONTO V. TORONTO RAILWAY COMPANY.

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*Street Railways—Toronto Railway Company—Time Tables—Routes—Open Cars
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Upon an appeal by the defendants and a cross-appeal by the plaintiffs the judgment of Anglin, J., reported 9 O.L.R. 333, as to the construction in certain respects of the agreement between the City of Toronto and the Toronto Railway Company was affirmed except as to the running of night cars, the Court of Appeal being of opinion, reversing the judgment below on this point, that a car which starts on its route before midnight must finish its route even if it has to run after midnight to do so.

AN appeal by the defendants and a cross-appeal by the plaintiffs from the judgment of Anglin, J., reported 9 O.L.R. 333, on certain questions submitted as to the construction of an agreement, was argued before MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 2nd and 3rd of October, 1905.

C. Robinson, K.C., and J. S. Fullerton, K.C., for the plaintiffs.

W. Cassels, K.C., W. Laidlaw, K.C., and J. Bicknell, K.C., for the defendants.

November 13. The judgment of the Court was delivered by OSLER, J.A.:—It is necessary to refer as briefly as possible to the pleadings in the action in order to see what was in issue between the parties, and to understand the contentions made by them respectively as to the answers which should be given to the questions submitted.

The action was brought upon the agreement set forth as a schedule to 55 Vict. ch. 99 (O.), between the plaintiffs and the defendants, relating to the, purchase of the street railways and properties and the street railway privileges of the plaintiffs, and the defendants' rights, duties and obligations in the working and management of the railways and privileges so acquired. The plaintiffs claimed a declaration as to the rights of the parties under the agreement in respect of (1) the obligation of the defendants under sec. 14 of the conditions incorporated in

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the agreement to establish new lines and to extend their tracks and street car service; (2) their obligation under the 36th clause of the conditions as to the period of the year during which open cars might be run and during which closed cars should be heated; and under clause 25 the routes, hours and intervals during and at which night cars should be run, all of which matters, as the plaintiffs contended, were subject to the regulations and directions which had been made by their engineer and approved by themselves, but which the defendants had neglected and refused to conform to; (3) the obligation of the defendants under clauses 26 and 27 to conform to the directions of the engineer approved by themselves, as to the routes, hours of service, number of cars to be operated, and times of departing of cars and intervals between cars.

The plaintiffs also asked—(1) that the defendants might be ordered to specifically perform the agreement “in the said several matters,” that is to say: (a) to lay down the lines of street railway which the plaintiffs had required them to lay down and establish and to operate street cars thereon; (b) to discontinue the use of open cars and to heat closed cars within the dates specified as the plaintiffs had required them to do; (c) to run night cars on such routes and at such intervals as might be deemed necessary by the city engineer and approved by the council; (2) an injunction to restrain the defendants from operating the railway in the city without complying with the above, and to restrain them from operating their cars except in accordance with the service and time-table determined by the engineer and approved by the council, as set forth and alleged in the statement of claim; (3) damages for the breach and non-performance of their agreement.

The defendants contended that they were not bound to lay down new lines or extensions within territory taken into the city limits after the date of their agreement; that the only consequence of their default in laying down new lines and making any extensions required was that the city might itself construct them, or might confer the franchise in respect thereof upon other persons or corporations; and that upon the true construction of the agreement, the regulations and directions which were sought to be imposed upon them with regard to the

running of their cars and as to open and closed cars and the heating of cars, were in respect of matters which the company was at liberty to decide for itself, and were not within the powers of the plaintiffs or their engineer to make or to impose upon them.

After the pleadings were closed the parties agreed upon a special case for the opinion of the Court in the following terms: "The parties desire before proceeding to take further evidence in this case to obtain the opinion of the Court upon certain questions of law arising on the construction of the agreement on which the action is brought.

These questions are:—

Is the city or the railway company, and which of them, on the proper construction of the agreement, entitled to determine, decide upon and direct:—

1. What new lines shall be established and laid down and tracks and service extended thereon by the company whether on streets in the city as existing at the date of the agreement or as afterwards extended?

2. What time-tables or routes shall be adopted and observed by the company?

3. Whether, if so determined by the city engineer, with the approval of the city council, cars which start before midnight must finish the route on which they have so started, though it may require them to run after midnight?

4. At what time the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars should be provided with heating apparatus and heated?

5. In the event of the decision of the Court being in favour of the city on any of the above questions, is the city entitled to a decree for specific performance as to the matter so decided or in any and which of them?

6. Is the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open same for traffic or to extend the tracks and services upon any street or streets as provided by the agreement, the only remedy the city can claim?"

The learned Judge before whom the special case was heard in the Court below answered the 1st, 2nd, 4th, and 6th ques-

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tions in favour of the plaintiffs; the 3rd in favour of the defendants, and as to the 5th question held that it was not ripe for decision. This question, therefore, remains not answered.

With regard to the first question, it was conceded on the argument and for the purposes of the appeal that it related to extensions of lines and construction of new lines within the territorial extensions of the city since September, 1891, and that it was practically disposed of by the judgment of this Court in the recent case between the same parties, reported in 5 O. W. R. 130, and the point was not argued before us, the parties being left free to raise it before any other appellate tribunal if they shall be so advised.*

The form of the answer should, however, be varied so as to read as follows: "It is for the city and not for the railway company to determine, decide upon, and direct, and in the manner prescribed by clause 14 of the conditions of the agreement of the 1st of September, 1891, what new lines shall be established and laid down and tracks and services extended thereon by the company whether on streets in the city as existing at the date of the agreement or as afterwards extended."

I pass on to the 6th question as it relates to the matters referred to in and disposed of by the answer to the first. The conditions which apply to this question are the 14th, the 11th, and the 17th. Condition 14 provides that the purchaser *will be required* to establish and lay down new lines and to extend the tracks and street car service on such streets as may be from time to time recommended by the city engineer and approved by the city council, within such period as may be fixed by by-law to be passed in the prescribed manner, and all such extensions and new lines shall be regulated by the same terms and conditions as relate to the existing system, etc.

By the 11th condition it is provided that when the purchaser desires, or is required, to change any existing tracks and substructures for the purpose of operating by electric power, etc., the city will lay down a permanent pavement in conjunction therewith upon the track allowance to be occupied

* Since writing this, our judgment appears to have been affirmed by the Judicial Committee of the Privy Council.

by such new tracks, etc. This shall at first apply only to existing main lines, and thereafter to branch lines or extension of main lines and branches as and when the city engineer may from time to time recommend and the city council may direct and require. And condition 17 provides that in case the purchaser fails to establish and lay down any new line as aforesaid and to open the same for traffic, or to extend the tracks and services on any street or streets as herein provided, the privilege of laying down such new lines or extensions in the street or portion of street so *abandoned* by the purchaser may be granted by the council to any other person or company, and the purchaser shall in such case have no claim against the city for compensation.

The contention of the defendants is that upon the true construction of their contract it is optional with them to construct branch or new lines and extensions under condition 14, and that the only consequence of or penalty for their default is that provided by sec. 17, viz., that they are to be taken to have *abandoned* all right to construct and operate their railway on the particular street along which the branch or extension has been required to be made, and that the city may confer the privilege of doing so upon anyone else.

The Court is asked to say whether this is the only remedy the city can claim in case of the company's default. They do claim, as appears by the pleadings, other and much more effective remedies.

No point was made on the argument of the variation in the expression made use of in the several conditions—condition 11 speaking of “branch lines or extensions,” and conditions 14, 15, and 17 of “new lines and extensions.” I assume that they all mean and refer to the same thing.

It is unnecessary to refer in detail to the manner in which the defendants were substituted for and now stand in the place of the individuals with whom the city first dealt in disposing of the franchise. This all appears in full in 55 Vict. ch. 99 (O.) and its several schedules, and the defendants may be treated for the purposes of the case as having dealt with the city directly in the first instance. What the city proposed to grant was the exclusive right for twenty years upon the conditions

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and tender and by-law annexed to the agreement of the 1st of September, 1891, and made part and parcel thereof (5th recital and 12th clause of the agreement) to operate surface street railways within the city, except certain specified parts thereof. The conditions (called also the specification) were those upon which tenders were called for and were made by the defendants or those in whose shoes they stand, and their tender upon which was accepted by the plaintiffs.

The tender, in my opinion, is an offer to do, perform and fulfil what they may be "required" to do under the terms of the 14th condition, which is perhaps more accurately described as one of the stipulations or proposals shewing the nature and extent of the engagements into which the tenderer will be required to enter upon the acceptance of the tender, under the formal contract to be executed as required by the 45th condition. And by the 12th clause of that contract the parties mutually and respectively covenant, promise, and agree with each other to carry into effect, observe, perform, and fulfil all the provisions and stipulations therein contained and to be carried into effect, observed, performed, and fulfilled by them respectively. And by the 13th clause the defendants covenant, promise, and agree with the plaintiffs that they will fulfil all the conditions, stipulations, and undertakings in the agreement contained, it being understood that the reference to particular matters to be performed by the purchasers shall not diminish or limit the obligations of the agreement. I regard these clauses as containing an absolute covenant on the purchasers' (defendants') part to do what may be required of them under the 14th condition, and the 17th condition as providing no more than an optional or alternative remedy in the event of their failure to do so. Before the defendants can be in default, the city must have incurred the expense of laying down a permanent pavement upon the track allowance for the proposed branch lines or extensions, and the remedy of conferring a franchise upon another company or individual to operate a railway thereon, without the power of doing so in connection with the defendants' railway, would in the circumstances be of a most futile and ineffectual character, as is well pointed out by Anglin, J., in dealing with the subject.

Clause 46 of the conditions further provides that in case of neglect or failure on the part of the purchasers (defendants) to perform any of the conditions of the agreement to be entered into in accordance with clause 45, the purchasers shall in each such case of failure pay to the city the sum of \$10,000 as liquidated damages and not as a penalty.

I think, therefore, that the sixth question is properly answered in the terms in which it is put, namely, that the privilege to the city to grant to another person or company for failure of the company to establish and lay down new lines and to open the same for traffic or to extend the tracks and services upon any street or streets, as provided by the agreement, is not the only remedy the city can claim.

Nothing more than this is decided by the answer.

The second and fourth questions as numbered, with their introductory clause, may be considered together.

Paragraphs 6, 7, 8, 11 (a), and 12, of the statement of claim set forth the subjects with which these questions are concerned. The plaintiffs contend that they all come within what may be called the speed and service clauses of conditions, and that they are matters which are to be or which may be determined upon, decided, and directed by their officer and themselves in the manner indicated in the questions, namely, by prescribing time-tables and routes and the time at which the use of open cars shall be discontinued in the autumn and resumed in the spring, and when the cars shall be provided with heating apparatus.

I pass over the third question for the present, as it is one of the subjects of the cross-appeal, though much of what is said in disposing of the other two will apply to it.

One cannot read the contract between these parties without seeing how anxiously—I do not know how effectively—the city has attempted to provide in many respects for the control of their streets and for the protection and convenience of the public. They were conferring upon the defendants a valuable franchise, but there was no intention to give them a free hand to manage the railway as they pleased and to run it to suit their own ideas of what might be best for the citizens. The plaintiffs have, therefore, by clause 26 and other clauses reserved a large control over the manner in which the defen-

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dants are to manage and carry on their business as regards the accommodation of the public, and in the word "service" in the 26th clause have used a popular or business term of, as I think, very wide meaning. Some of the meanings of the word, and those in which it is here employed, are found in the Century Dictionary: "That which is supplied or furnished; the act or means of supplying that which is in general demand, or of providing specific accommodation—said of transportation, as of railway or mail service . . . 'service-stop,' a stop made by a railway train at a regular time and place."

Having regard to the transfer arrangements which are provided for by clause 33, and which must be made with the approval of the city engineer and "the endorsement of the council," it appears to me that it is for the city engineer, with the approval of the council, under the other clauses referred to, to determine by schedule or time-table, whichever may be the appropriate term, the times at which the cars shall be run over the whole railway system. There is no definition of the terms "main line," "branch," "route."

Sec. 26 speaks of "the speed and service" necessary on each "main line or branch." This is to be determined by the engineer and approved by the council.

Sec. 27 deals with "day cars." These are to commence running *on all routes* not later than 5.30 a.m. and to run until 12 o'clock midnight. The power of the engineer is, with the approval of the city council, to determine the intervals at which they are to run during the day as thus defined.

Sec. 28 deals with night cars. Here it is for the engineer and council to say on what routes and at what hours and intervals it is necessary that such cars shall be run.

It was strongly urged by the defendants that the city engineer and council had no power to determine the particular route service to be furnished by them, taking the word "route" to indicate the sending of the same car over more than one main line on a continuous journey, *e.g.*, the Yonge street and College street route, the King street and Bathurst street route, the Belt Line route, etc., and that it was for the defendants from time to time to determine such routes, and then for the engineer and council to determine the headway or interval of

the cars which should run over them. With this, however, I do not agree. That a route service in the sense I have mentioned was contemplated by the agreement is implied by the reference, in various parts of the instruments which compose it, to "curves," without which such a service would be impossible, and it is merely the continuance under the electric system of the practice which prevailed under the old horse-railway system on a smaller scale. The construction contended for would unduly restrict the meaning of the word "service" in the 26th clause, which is not limited to headway or interval service over the whole of any main line. It is comprehensive enough to include a service of cars over parts of two or more main lines or a main line and a branch, and clause 27 provides for the details of the service as regards the intervals at which it shall be supplied.

The answer to the second question, therefore, is that it is for the city engineer, with the approval of the city council, to determine, decide upon, and direct what time-tables and routes shall be adopted and observed by the company. As regards the fourth question, I think that it also is answered by the application of the 26th clause. The use and discontinuance of the use of open cars, and the period of the year during which closed cars shall be heated, are all matters fairly embraced by the general term "service" as used in that condition. In this respect the question is properly answered in the terms of the judgment below.

Then as to the cross-appeal. The day and night cars are different classes of cars, running as such at different hours and different intervals, and the fare on the one is double that on the other. Clause 27, which deals with the former, does not say that day cars shall stop running at 12 o'clock midnight, but that they shall "run until 12 o'clock midnight at such intervals as the city engineer, etc. . . may determine." And what clause 30 says is not that the fare shall be double *after midnight*, but that fares on *night cars* shall be double the ordinary maximum high fare rates.

I think that clause 27 means no more than that the day cars shall not be sent out at or after midnight. When sent out, as they can only lawfully be sent out, before that hour, they

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must finish their route, otherwise the right or power to require them to run at intervals until 12 o'clock midnight would be useless for most practical purposes after 11.30 p.m. The word "run" refers to the period of starting, the lapse of the interval prescribed between the setting forth of one car and that of the next following car on the route. It does not refer to the journey of the cars over the route. There is something of the ludicrous in the defendants' contention that when 12 o'clock arrives the car may be stopped, and that passengers who have paid on entering the car and may have entered it for a journey over the whole route may be required to leave it wherever it may then happen to be, however distant from their destination. I do not understand that clause 33, relating to "transfer arrangements," is intended to make provision for transfer from a day car to a night car, except in the same circumstances and for the same purpose as it is made from one day car to another, *i.e.*, to enable a passenger arriving at a connecting point on a day car to transfer to a night car if there should be no day car there, without paying anything more for the journey. Probably by the exercise of a little common sense and forbearance the clause might readily be utilized in framing the day and night car schedules. I am, therefore, of opinion that the judgment below should be varied in this respect, and that the answer to the third question should be that cars which have been started before midnight under the direction of the city engineer, approved by the council, must finish the route on which they have so started, although in order to do so it may be necessary for them to be run after midnight.

Whether there is any obligation upon the city engineer to give notice to the company before determining the several details of service referred to in the questions submitted by the special case, is a question upon which we are not called on to express, and do not express any opinion. No doubt it is only reasonable that this should be done, and that the action of the engineer should be taken only after mutual discussion and consideration, but the point is not before us.

Lastly, as regards the fifth question submitted: assuming that the cross-appeal is competent, though the question has not

been answered, I am of opinion that it was properly dealt with by the learned Judge, and for the reason given by him, namely, that the point was not ripe for decision. As he very well says: "It will be time enough to determine whether the remedy by specific performance is open to the plaintiffs under the statute [63 Vict. ch. 102, secs. 1, 5 (O.)] when they have established a case to which the statute applies; time enough to consider their right to this relief, apart from the statute, when it becomes clear that the statute has no application."

The judgment below will, therefore, be varied in the particulars above indicated.

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MACARTNEY V. COUNTY OF HALDIMAND.

Municipal Corporations—Contract—By-law—Purchase of Land—Conveyance to Corporation—Attempted Rescission.

A municipal council desiring to maintain as required by statute (3 Edw VII. ch. 19, sec. 524) an industrial farm passed a by-law directing that "a farm be purchased for an industrial farm." Tenders were then called for; a committee was appointed to examine the properties offered, that of the plaintiff being among them; the plaintiff's tender was accepted; the title to his property searched by the corporation's solicitor; and a conveyance of the property to the corporation obtained and registered. A cheque in the plaintiff's favour for the purchase money was made out and signed by the proper officers, but before its delivery to the plaintiff a by-law was passed by the council rescinding the former by-law, ordering the cheque to be cancelled, and directing the property to be reconveyed to the plaintiff:—

Held, that the transaction was an executed one, the benefit of which the corporation had obtained, and, notwithstanding the absence of a by-law specifically authorizing it, could not be rescinded against the will of the plaintiff, in whose favour judgment for the purchase money was accordingly given.

ACTION tried at Cayuga, at the autumn sittings, 1905, before CLUTE, J., in whose judgment the facts are stated.

George Lynch-Staunton, K. C., and *J. Harrison*, for the plaintiffs.

W. M. Douglas, K. C., and *T. A. Snider*, for the defendants.

December 1. CLUTE, J.:—The plaintiffs bring this action against the county of Haldimand to recover \$3,581.60, being the purchase price of land sold and conveyed to the defendants for an industrial farm. 3 Edw. VII. ch. 38 (O.) provides that (sec. 1) the corporation of every county or union of counties before the 1st day of January, 1906 [now 1908, by 5 Edw. VII. ch. 13, sec. 25 (O.)] shall erect and establish for such county or union of counties a house of refuge for the reception of persons of the classes described in sec. 526 of the *Municipal Act*. By sec. 3 the plans for every such house of refuge shall be submitted to the Inspector of Prisons and Public Charities for his approval before the erection thereof.

At the first meeting of the county council for the year 1904, all the members being present, a resolution was passed "that tenders be received up to the next meeting of this council

for a farm of not less than 45 acres for the erection of an industrial home in the county of Haldimand."

It appears from the minutes of meetings of the council held on the 16th and 17th of March, 1904, that "the tenders for the industrial home and house of refuge, nineteen in number, were read and considered by the whole council. It was decided to look at the sites offered in eleven of the tenders, etc.," among which was the tender of the plaintiff.

The following resolutions of council were passed at the same meeting of council:—

"Smith-Urie: That the council do now go into committee of the whole to consider the tenders for the location of an industrial home, and that the warden do now leave the chair and Dr. Burns be appointed chairman of the committee: carried.

To the warden and members of the county council in session:

Gentlemen: We, your committee of the whole on tenders for farm for house of industry, beg leave to report that we have gone carefully over the nineteen tenders presented to us and recommend that the members of council as a committee of the whole visit the various sites which they consider eligible and report at their earliest convenience.

W. J. Burns, Chairman.

Kett-Urie: That the committee of the whole do now rise, and that the council resume business with the warden in the chair.

VanKeuren-Allen: That the report of the committee of the whole be adopted: carried.

Urie-Ramsey: That the report of the council in committee be adopted: carried."

Afterwards the council as a committee of the whole inspected the lands mentioned in the said tenders, including that of the plaintiff.

And at a subsequent meeting of the council, held on the 22nd of June, 1904, the following resolutions were passed:

"VanKeuren-Ramsey: That the council do now adjourn for the committee of the whole to meet, re the house of refuge: carried.

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Smith-Burns: That the report of the committee of the whole council *re* industrial home be received and read: carried.

Urie-VanKeuren: That the report of the special committee be adopted as read: carried.

Ramsey-Werner: That the council do now adjourn and go into committee of the whole, *re* house of refuge: lost.

Miller-Smith: That the council do now adjourn to allow the committees to meet: carried.

Ramsey-Burns: That the council do now adjourn and go into a committee as a whole, *re* house of refuge: carried."

The report is as follows:—

"To the warden and council of the county of Haldimand: Gentlemen: We, your committee of the whole, appointed to select a site for a county house of refuge, beg leave to report: That after an examination of nearly twenty farms, we find that the most suitable location for the house of refuge is the farm of Mr. W. A. Macartney, within the corporate limits of the town of Dunnville. The site recommended is the highest within the boundaries of the town. The soil is suitable for growing small fruits and vegetables, such as the inmates of the home are best able to care for. The building can be erected there at less cost than almost any other suitable place in the county, as stone, brick, and sand, may all be obtained within four miles of the site. The town of Dunnville will make a free grant of their park lot, of about five acres, if this report is adopted, giving a wide frontage on one of the main streets of the town. In this location we would have the advantage of a free telephone, which, in the case of fire or the calling of medical aid, and in ordering supplies, without the overseer leaving the farm or its inmates, would be a decided gain to the county.

Your committee also recognize the advantage of a large supply of pure filtered water that the town will grant free for a term of years, which would save the cost of a county plant, and also giving the county building the benefit of efficient fire protection, as well as reducing the cost of insurance. A plentiful supply of natural gas, the cheapest fuel in the Province, can be had at this site, with a reduction of 20 per cent. from the company to a charitable institution. The home could also be connected with the electric light system of the town, making a

cheap, up-to-date light that the inmates would have no control over, which would thereby reduce the risk of fire.

Your committee would also call your special attention to the fact that the people of the county will expect this council to locate the house of refuge where it will be the nearest self-sustaining and not a drag on the taxpayers of the county, and your committee believe that with the canning factory only one half mile away it would be a market for all the small fruit and vegetables the farm could produce, at the same time making the home nearly or quite self-sustaining.

All of which is respectfully submitted.

W. J. Burns, Chairman."

"VanKeuren-Ramsey: That the report of the committee of the whole be adopted as read: carried. Yeas: Miller, Warner, Burns, VanKeuren, Ramsey, Kett. Nays: Smith, Urie, Allen, McConnell."

On the 7th of October, 1904, the following by-law was passed and the seal attached:

"By-law of the municipal council of the county of Haldimand for the purchase of a farm and the erection thereon of a house of refuge. It is hereby enacted by the municipal council of the county of Haldimand that a farm be purchased for an industrial farm and a house of refuge for indigent persons erected thereon in the county of Haldimand. (Seal.)

T. A. Snider, Clerk. M. McConnell, Warden."

On the same day a committee was appointed "to survey and purchase the Macartney farm for the erection thereon of an industrial home," etc.

The title was passed by the solicitor for the county, who is also the clerk; the deed was duly executed and registered at the instance of the county, and, on the 2nd of February, 1905, this committee duly made their report as follows:

"To the warden and members of the county council of the county of Haldimand: Gentlemen: Your committee appointed to survey and purchase the Macartney farm at Dunnville for the purpose of a county industrial farm, have, as instructed by the county council, had the farm surveyed by W. W. Fairchild, Esq., Provincial Land Surveyer, and the purchase of the farm,

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comprising 44⁷⁷/₁₀₀ acres has been completed and the deed registered.

All of which is respectfully submitted.

T. A. Snider.

R. F. Miller, Chairman."

On the same day this report was adopted by a resolution of the council.

In June an application had been made to the Inspector of Prisons and Public Charities for an inspection of the Macartney farm for a site for the erection of a house of refuge for the county of Haldimand. The inspection was made, and the inspector recommended that the site be approved. An architect was appointed, who prepared the plans, which were also approved. On the 10th of June, 1905, the defendants were formally advised of the action of the Government, in the following letter:

"Toronto, Jan. 10, '05. Dear Sir, I beg to enclose the official approval of the site known as the Macartney farm near Dunnville, for the house of refuge, also the official approval of the plans submitted to me December 27th last, for the house of refuge for the county of Haldimand.

I have the honour to be, etc.,

R. W. Bruce Smith, Inspector."

The following is the letter of approval:

"Toronto, Ont., Jan. 10, 1905.

T. A. Snider, County Clerk.

Sir: I beg to report that application was made to this Department in the month of June last to have an inspection made of the property known as the Macartney farm, selected near the town of Dunnville for a site for the erection for a house of refuge for the county of Haldimand.

Owing to the illness of my predecessor, Dr. Chamberlain, the Honourable the Provincial Secretary instructed Inspector Noxon to visit the county of Haldimand and inspect the proposed site. This was done, but on his return Inspector Noxon was taken ill and a report was not made in regard to the matter. On December 27th last plans for the proposed house of refuge were placed before me, and on examination

were found satisfactory. Inspector Noxon reports that he was quite satisfied with the site chosen and which he inspected near the town of Dunnville. The conditions of the Act having been complied with, I recommend that approval be now given of the site chosen and inspected and of the plans submitted.

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I have the honour to be, etc.,

R. W. Bruce Smith, Inspector."

The defendants also entered into a contract for the erection of a house of refuge, and the contractor placed the building material upon the five acres adjoining the land in question, which the town of Dunnville had conveyed to the defendants for this purpose, the deed being held in escrow until the completion of the building, the intention being to use the land in question and the five acres together for the purpose above mentioned.

The five acres would not have been conveyed if the plaintiffs' property had not been purchased.

All matters incidental to the purchase having been completed, the treasurer, on the order of the warden, issued a cheque for the amount of the purchase money, payable to the order of the plaintiffs' solicitor, for "land for house of refuge," and delivered the same to Mr. Maybee, the county clerk, and solicitor for the county, to be delivered to the plaintiffs' solicitor.

On the 3rd of February, 1905, the following resolutions and by-laws were passed:

"Moved by Mr. Gardner, seconded by Mr. S. W. Winge, and resolved, that the by-law for the purchasing of the Macartney farm at Dunnville for the building of a house of refuge be and is hereby repealed. Yeas: W. J. Land, S. W. Winge, H. F. Gardner, G. Allen. Nays: R. F. Miller, L. Werner, G. VanKeuren, F. W. Ramsey: carried. Jas. Urie.

Moved by Mr. Long, seconded by Mr. Allen, and resolved, that the cheque signed by the ex-warden and now in the hands of the clerk for the payment of the Macartney farm be withdrawn and destroyed. Yeas: W. J. Long, S. W. Winge, H. F. Gardner, B. Allen, J. Avery, J. Urie. Nays: R. F. Miller, L. Werner, G. VanKeuren, F. W. Ramsey: carried. Jas. Urie.

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Moved by Mr. S. W. Winge, seconded by Mr. Gardner, and resolved, that a bill be introduced to draft a by-law to repeal the by-law No. 361 and the clerk be instructed to draft same. Yeas: W. J. Long, S. W. Winge, H. F. Gardner, B. Allen, J. Avery, J. Urie. Nays: R. F. Miller, L. Werner, G. VanKeuren, F. W. Ramsey: carried. Jas. Urie.

By-law No. 370, to repeal by-law No. 361, of the county of Haldimand.

Be it therefore enacted by the corporation of the county of Haldimand in council assembled that by-law No. 361 of the by-laws of the county of Haldimand be and the same is thereby repealed. Passed in council this 3rd day of February, 1905.

H. Snider, Clerk.

Jas. Urie, Warden.

By-law No. 372, to reconvey the Macartney farm to the former owners.

Therefore be it enacted and it is hereby enacted by the corporation of the county of Haldimand in council assembled that the lands conveyed by W. H. Macartney and others to the county of Haldimand for the purpose of an industrial farm for the county of Haldimand be reconveyed to the said W. H. Macartney and others, owners thereof, and that the same be registered before delivering the same, and that the warden and clerk execute such deed and attach the corporate seal thereto. Passed in council this 3rd day of February, 1903. (Seal.)

H. Snider, Clerk.

Jas. Urie, Warden."

The following resolution was passed on the 9th of March, 1905: "Moved by Mr. Gardner, seconded by Mr. Wenger, and resolved, that this council does not consider itself bound to accept the Macartney farm (on advice of Mr. Glenn), and that we instruct our solicitor, Mr. Snider, to defend any suit that may be brought against the county, and that he be further instructed to procure legal assistance in the matter. Yeas: Lang, Wenger, Gardner, Allen, Avey, Urie. Nays: Miller, Werner, VanKeuren, Ramsey: carried. Jas. Urie."

The effect of these resolutions and acts of the council may be shortly stated: A by-law was passed to buy a farm; tenders were advertised for and received; some nineteen farms were examined; the plaintiffs' tender was finally accepted; the

approval of the Government was obtained; the title was examined and passed; a committee was appointed to complete the purchase; the deed was prepared by the defendants, duly executed by the plaintiffs and registered by the defendants, and a cheque, signed by the treasurer on the order of the warden, was handed to the defendants' solicitor, ready for delivery to the plaintiffs' solicitor.

The deed purporting to reconvey the lands in question to the plaintiffs recites the parties, the negotiations and the price, and that the plaintiffs executed a conveyance and delivered it to the clerk, who registered the same, and that the purchase money was not paid during the term of office of the old council; that the new council declined and refused to carry out the negotiations for the purchase "of the said farm, entered into by the council of the year 1904," or to accept the conveyance or pay the purchase money, "and whereas this conveyance is made for the purpose of reconveying the said lands and vesting the same in the parties of the second part as and for their former estate therein." There follows the usual short form conveyance executed under seal and signed by the warden and clerk.

The by-law in pursuance of which this deed was executed, and the resolution upon which it was introduced, are contrary to by-law 320, sec. 22, governing the proceedings of the council, as the resolution was not "moved and seconded by two members from among those who voted with the majority that carried the resolution confirming the report of the committee appointed to complete the sale," but I think it is evidence tending to shew that the contract of purchase was completed and the land vested in the defendants. The committee reported that the purchase was completed, and their report was adopted by the council.

The defendants say that the alleged contract was not authorized by by-law and is not binding on them, and that the committee had no authority to bind the defendants, and that the cheque was issued without authority.

They further allege that the claim is in respect of a debt alleged to be incurred in 1904, and was not within the ordinary expenditure, and no estimate was made nor was any assessment

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made or levied for payment of the debt, nor any by-law passed for the creation of the debt or for imposing a rate for the payment thereof, and allege that there are no moneys out of which to pay the plaintiffs' claim. They also plead the Statute of Frauds.

Sec. 524 of the Municipal Act provides that lands may be acquired for industrial farms, houses of industry and refuge. 5 Edw. VII. ch. 13, sec. 25, sub-sec. 1 (O.), makes the acquisition compulsory within the time limited.

By sec. 325 the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.

Sec. 13 of the standing by-laws of the council, chapter 320, passed on the 16th of June, 1900, declares that "a special committee may be appointed by the council at any time to consider and report on any matter or to perform any special service."

In *Bernardin v. North Dufferin* (1890), 19 S.C.R. 581, it was held (Ritchie, C.J., and Strong, J., dissenting) that a corporation is liable on an executed contract for the performance of work within the purpose for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and that this applies to municipal as well as other corporations. Many of the authorities are reviewed in this case.

In *Lawford v. Billericay Rural District Council*, [1903] 1 K.B. 772, the English cases are reviewed, and the line of cases which were given effect to in *Bernardin v. North Dufferin* are approved by the Court of Appeal in England.

Both of these cases were for work done and goods furnished, and of which the corporation had had the benefit.

Does the present case fall within the exception recognized in the last mentioned cases?

I have carefully considered the cases cited, and after some doubt have reached the conclusion that it does.

In the present case the building of the house of refuge is compulsory under the Act. The council had taken nearly a year to decide which farm they would take. It passed a by-law with a view of carrying out its duty as directed by the

statute, and I have no doubt whatever until the day when the by-law was repealed and the cheque withdrawn, the council, both old and new, considered the contract completed except handing over the cheque. I think it is to be fairly inferred that the council did not consider a by-law other than the one passed necessary to purchase the farm, and the resolution and by-law authorizing the repeal of this by-law referred to the Macartney farm, shewing, in my judgment, that the by-law when it was passed referred to that farm. The by-law, the resolutions, and the acts of the defendants, leave no doubt upon my mind that the council proceeded deliberately; took every reasonable means in satisfying themselves in making a choice, and finally, for good and satisfactory reasons, decided to purchase the land in question. They appointed a special committee, acted upon the report of that special committee, and confirmed all that had been done. It may be fairly said, I think, that the acts of the council, including their application to the Ontario Government for approval of selection, the receipt of the deed and its registration, and the approval of the council after this had been done, shew the contract to be fully executed upon the part of the vendors and accepted by them, and I find as a fact the contract was completely executed upon the part of the plaintiffs and accepted by the defendants. To test the case, suppose after the registration of the deed and the confirmation by the council, the plaintiffs had brought an action to get rid of the purchase, is it possible that they could have succeeded? I think not. Their position has been changed; the title to the land has been changed; at all events a cloud had been put upon the title. It appears, however, that after this had been done, and before action, the council repealed the by-law and withdrew the cheque and deeded back the property. Can this make any difference? I think not. It rather strengthens the plaintiffs' position. It shews by the by-law that the defendants considered the property in the land had passed to the defendants; that the transaction was completed, and a reconveyance of the property was necessary to relieve the defendants from their liability. It is worthy of notice that the resolution directing the reconveyance provides that the deed shall be registered

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before its delivery to the plaintiffs. In other words, the defendants intended not to allow the plaintiffs to demur to their act. The conduct of the defendants can be regarded as little less than a trick to get rid of the responsibility which they had solemnly assumed, and to repudiate a contract which their council had solemnly approved.

It was strongly urged by Mr. Douglas that *Waterous Engine Works Co. v. Palmerston* (1892), 21 S.C.R. 556, is a case which supports the defendants. But that case proceeded directly upon the ground that the contract was executory and not executed. Strong, J., in giving judgment, says: "Mr. Justice Rose, before whom the case was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In that conclusion I entirely agree. The much debated question as to the liability of a corporation on a executed contract not entered into with the requisite formalities imposed either by common law or by statute does not, therefore, arise here." And he points out at p. 561 that in *Bernardin v. North Dufferin* the contract was executed, and proceeds to apply the principle of *Young v. Leamington* (1883), 8 App. Cas. 517, and *Hunt v. Wimbledon* (1878), 4 C.P.D. 48, to an executory contract. It may be noted that *Waterous Engine Works Co. v. Palmerston* was prior to *Lawford v. Billericay Rural District Council*, and that the line of decisions followed are those given effect to in the Court of Appeal.

It may be said that this is a case of the sale of land and that a different principle should be applied, even to an executed contract, than that recognized in *Bernardin v. North Dufferin*, and *Lawford v. Billericay Rural District Council*; but it has long been recognized, and in *Pim v. Ontario* (1860), 9 C.P. 302, at p. 307, it is pointed out that "when land has been used and occupied by a corporation, the law implies a promise to pay a reasonable compensation: *Dean and Chapter of Rochester v. Pierce* (1808), 1 Camp. 466; *Mayor of Stafford v. Till* (1827), 4 Bing. 75; *Lowe v. London and North-Western R. W. Co.* (1852), 17 Jur. 375."

Here what was done in respect to the land was, I think, equal to occupation by the defendants. The deed was registered; the property in the land passed; action was taken for building the house of refuge upon the adjoining land, which it was admitted would not have been done had this property not been purchased. Further, I do not see any principle why there should be any distinction in respect of land and goods. Strong language is used by many of the Judges in the different cases as to the conduct of a corporation in attempting to repudiate a contract fairly entered into simply because it lacked the formality of a seal or a by-law. In that view I fully agree, and in the present case I think that it would be little less than countenancing a fraud to permit the defendants to repudiate an engagement which they solemnly entered into, although it lacked the formality of a by-law.

I do not think the second ground of defence, namely, that no assessment was levied for the payment of this debt nor for imposing a rate for the payment thereof, ought to prevail. A by-law was duly passed on the 24th of June, 1901, to raise \$25,666.52 to meet the liabilities and current expenses, of which \$9,916.52 is for general and contingent expenses. The evidence is very meagre as to whether the land in question was to be paid for out of current account or not, but I think it a fair inference from the evidence that it was. There was no suggestion that the cheque given for the purchase money would not have been paid if presented. I do not think it a case where the vendors should be called upon to see if the council had properly discharged their duty.

The Statute of Frauds was also pleaded, but while this defence was not explicitly abandoned on the argument, I did not understand it to be seriously pressed; nor do I think it can be supported on the evidence.

I am, therefore, of opinion that the plaintiffs are entitled to recover the amount of the purchase money, \$3,581.60, with interest from the 2nd of February, 1905, and the costs of this action.

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UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM

v.

TOWNSHIP OF HAMILTON AND TOWNSHIP OF HALDIMAND.

Toll Roads Expropriation—Costs of Arbitration—Toll Roads Expropriation Act, 1901.

A county which, upon the petition of the ratepayers affected, presented through the medium of two interested townships, and proceeding in accordance with the provisions of the Toll Roads Expropriation Act, 1901, initiates and takes part in an arbitration to fix the value of a toll road cannot recover from the townships the costs incurred by it.

ACTION to recover the costs incurred in an arbitration tried at Cobourg at the autumn sittings, 1905, before BOYD, C., in whose judgment the facts are stated.

H. F. Holland, and *W. F. Kerr*, for the plaintiffs.

F. M. Field, for the township of Hamilton.

J. B. McColl, and *J. F. Keith*, for the township of Haldimand.

December 1. BOYD, C.:—This litigation turns upon the meaning and effect of proceedings taken to expropriate the Grafton toll road under the Ontario Statutes of 1901 and 1902, 1 Edw. VII. ch. 33 (O.), as amended by 2 Edw. VII. ch. 35 (O.) Counsel at the bar freely criticized the enactments as complicated, confused, and difficult to understand. I am not disposed to disagree, and, did the matter turn upon the critical construction of many of the sections cited, I should rather despair of coming to any satisfactory conclusion. Happily I have only to deal with the legislation in the large, for the question is whether certain costs incurred in an arbitration proceeding, paid by the united counties, should be recouped by the two township municipalities defendants.

The Grafton toll road runs through the townships of Hamilton and Haldimand, in the united counties of Northumberland and Durham; and certain private proprietors of land, who used the road and paid tolls, became very anxious to procure a statutory cesser of such tolls by the machinery of the statutes. To this end two petitions signed by over fifty rate-

payers were obtained and presented to the councils of the municipalities concerned; that is to say, the petitions were addressed as well to each of the two local councils as to the council of the united counties. They were first presented to the local municipalities and those bodies gave their *imprimatur* to the proceedings and sent them on to the counties, and as to Hamilton, with a request, by way of resolution, that an arbitrator should be appointed.

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Under the statute, when the road is in two local municipalities, and each presents the sufficiently signed petition, the duty is cast upon the council of appointing an arbitrator and proceeding with the arbitration in order to fix the price to be paid for the toll road. No intervention by the councils of the townships in which the road is situated is required or contemplated by the statute. The request made by the one and the action of both, in becoming conduits for the passage of the petitions to the county, does not add to or detract from the duty and responsibility of the county, which is made by the statute the sole actor on one side of the arbitration proceedings, as against the road company on the other.

During the arbitration proceedings the wishes of the townships, through legal advisers, as to the person who should be named third arbitrator were ascertained, and pending the inquiry the townships assisted with counsel and witnesses, in order, as is proved, to assist in keeping down the price of the road as far as possible. And for the witnesses they subpoenaed and the counsel they employed the townships have made full payment.

The award being made and published, and the expenses and costs thereof being paid by the counties, it was found that the figure fixed for the expropriation of the road was deemed excessive by all the parties to this litigation, and the award ended in nothing, not being acted on within the time fixed by the statute. Different reasons are given by the counties for not making payment of the amount awarded; I suppose they hung back with a view of getting the townships to shoulder the financial responsibility; and other difficulties are foreshadowed in the evidence, such as that other municipalities were to some

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extent interested in the acquisition of the road and should contribute to the expense and costs.

It does not appear to me to be needful to dwell on or to discuss these things, which do not go to the essence of this dispute as to whether the plaintiffs should be relieved from the payment of costs, at the expense of the defendants, by the direct order of the Court.

I can see no ground upon which to rest such a judgment against the townships. The costs and expenses were incurred by the counties under the mandate of the law, and the law has not provided for unloading these on the townships, who are really no more than interested bystanders. There must be found something in the statutes to implicate the townships in liability for the costs incurred by the counties. The townships have paid such outlay as they incurred or sanctioned, but I find no evidence that they instigated or promoted the petitions, or that they sanctioned or are impliedly liable for what was expended by the counties in the abortive arbitration.

I expressed myself during the argument as against giving any alternative relief: that is to say, I find no reason to say that it should go back to the arbitrators to deal with these costs. Apart from all difficulties of procedure, which I do not consider, there is not intrinsically any ground to say that there has been a miscarriage or any inadvertence on the part of the arbitrators in this regard.

As to the costs of this action, while I dismiss the case, I direct that only one set of costs be taxed to the defendants. Both townships are in the same boat, no need to sever in their defences; indeed the severance is only as to form, for the substance of both pleadings is identical in language and effect, save only an extra paragraph in Haldimand's pleading, which is merely a denial and of no special significance as a defence.

R. S. C.

[IN CHAMBERS.]

UYLAKI v. DAWSON ET AL.

1905

Nov. 18.

Court of Appeal—Appeal from Order for New Trial—Security on Appeal—Stay of Trial—Rule 827—Removal of Stay.

A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed:—

Held, that the order for a new trial was “a judgment or order appealed from,” within the meaning of Con. Rule 827 (1), and, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal, by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to the case of a judgment or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be “executed” by proceedings to be taken thereunder or in consequence thereof.

In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a general rule such permission ought not to be granted; and in this case it was refused.

MOTION by the plaintiff for an order allowing him to proceed to trial pursuant to an order of a Divisional Court directing a new trial, notwithstanding an appeal by the defendants from the order directing the new trial; and for an order removing the stay, if any, caused by the allowance of the security given by the defendants for the purposes of the appeal.

The motion was heard by OSLER, J.A., in Chambers, on the 17th November, 1905.

R. McKay, for the plaintiff.

H. E. Rose, for the defendants.

November 18. OSLER, J.A.:—A new trial was ordered in this case and others, 6 O.W.R. 569, by a Divisional Court, with costs to be paid by the defendants (it would seem forthwith) to the plaintiff. The plaintiff has given notice of trial for the approaching assizes at Welland, and the defendants have appealed to the Court of Appeal from the order directing the new trial, and have given the security required by Rule 826, which has been duly allowed. A motion has been made before a Judge of the High Court to set aside the notice of trial, and the plaintiff now asks—I understand that it is on such an

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application that the case is now before me—that he may be permitted to proceed to trial, notwithstanding and pending the appeal, and that the stay, if any, caused by the allowance of the security, may be removed.

The order for a new trial, whether as regards that relief alone or as combined with the order for payment of costs, is, in my opinion, “a judgment or order appealed from” within the meaning of Con. Rule 827 (1) *, and, therefore, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, is stayed pending the appeal by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the lettered clauses following. The Rule, in short, is not confined to the case of a judgment or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be “executed” by proceedings to be taken thereunder or in consequence thereof.

In such a case as the present it may, under conceivable circumstances, be in the discretion of the Court to permit the plaintiff, on proper terms and conditions, to proceed to a new trial, notwithstanding the appeal, so that a verdict or judgment he may obtain thereon shall stand and be available if the appeal shall be afterwards dismissed, but, as a general rule, I think such permission ought not to be granted, partly because it may lead to inconvenient and embarrassing consequences in dealing hereafter with what is at present a competent appeal, if the plaintiff should in the meantime have succeeded in obtaining a verdict at the new trial, and partly also because proceeding to a new trial is entirely inconsistent (or seems so to me) with the prosecution of a competent appeal from the disposition of the first. How the Court might deal with the situation I do not know, but I am not satisfied that I ought to place the appellants in the position of possibly losing the advantage of an appeal which has been regularly taken after proceedings in

* 827.—(1) Unless otherwise ordered by the Court appealed to or a Judge thereof, the execution of the judgment or order appealed from shall . . . in the case of an appeal to the Court of Appeal, upon the security in Rule 826 mentioned being allowed, be stayed pending the . . . appeal, except in the following cases. . .

which the respondent has presumably led all the evidence and made the best case in his power. On the other hand, if it be held that the appeal is not affected by the new trial, no matter what may be the result of the latter, a great waste of costs and expense is inevitably incurred, and the absurd spectacle may be presented of an action being dismissed if the appeal is allowed, although the plaintiff may have obtained a verdict and judgment on the merits.

In the case before me I do not think that it has been made out that the plaintiff will be unable to procure his witnesses at a future trial, or that he will be able to present their evidence in a more favourable manner than it has been already given, *i.e.*, through an interpreter, and the appellants are willing and offer to allow such evidence to be read at the next trial, should their appeal be dismissed.

What I have said is restricted to the particular case of proceeding to a new trial pending an appeal (which is a step in the cause) from a judgment dealing with the first trial. Different considerations may apply to collateral or interlocutory proceedings or to the situation presented where a further appeal has been taken to the Supreme Court.

The respondent's motion to remove the stay is, therefore, refused. The costs of the application (as I have explained to the parties) will be costs in the cause.

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[IN THE COURT OF APPEAL]

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Oct. 13.

MAY ET AL. V. BELSON.

Cemetery—Family Burial Ground—Land-locked Plot—Reservation in Deed—Interference with Graves—Right of Descendants to Restrain—Abandonment—Possessory Title—Access to Plot—Way of Necessity.

Persons having an estate or interest in a plot of ground set apart and used as a family burying ground, in which the bodies of ancestors and relatives are interred, may maintain an action to restrain destruction of, injury to, or interference with the graves or the gravestones or monuments upon or over them.

Moreland v. Richardson (1856), 22 Beav. 596, and (1858), 24 Beav. 33, followed. Part of a farm was set apart as a family burial plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to the defendant's predecessor in title, "save and except about one quarter of an acre of said lands used as a burying ground." In 1890 one of the family erected on the plot, or what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge:—

Held, upon the evidence, affirming the judgment of Teetzel, J., that there was a burying ground in respect of which the reservation was made in the deed of 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot; and that the plaintiffs had shewn a sufficient interest in or title to the plot to enable them to maintain the action.

The plot being a land-locked piece of ground, reserved out of a grant of the surrounding property, there was an implied way of necessity to and from it, limited to the purposes for which the plot was expressed to be reserved.

AN appeal by the defendant from the judgment of Teetzel, J., delivered at the trial of the action without a jury.

The following statement of facts is taken from the judgment of Moss, C.J.O.:—

The plaintiffs are descendants and heirs-at-law of William May and Peter May, his son, two of the early settlers in the township of Grantham in the county of Lincoln. Five township lots were granted by the Crown to William May and his sons, and amongst others lot No. 21 in the 2nd concession of Grantham was granted to Peter May by letters patent dated the 10th August, 1801. The family were United Empire loyalists, and they and their descendants appear to have occupied and lived upon the granted lands for many years. At an early date, certainly not later than the year 1827, a small parcel of lot No. 21 in the 2nd concession was set apart as a family burial plot.

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It does not appear by whom this action was taken, but it was very probably a family movement, the site of the plot being selected upon lot No. 21. A number of the members of the family were interred in the plot, and among others William and Peter May and several of their descendants, and the plot seems to have been recognized as the family burial plot.

Though lot No. 21 was granted by the Crown to Peter May, William May appears to have been in the possession and occupation of the lands surrounding the burial plot.

William and Peter both died in the year 1827, and, as already stated, were buried in the plot. By an indenture of grant dated the 31st March, 1838, William May, a son of William May the elder, granted to John Clark a parcel of lot No. 21, containing 5 acres, 2 roods, and 17 perches, "save and except about one-quarter of an acre of said lands used as a burying ground." It is thus apparent that at the date of the indenture there was a portion of the parcel described which was being used as a burial plot.

The parcel of 5 acres, 2 roods, and 17 perches, passed by conveyance from owners claiming or deriving title from John Clark, until in February, 1903, it was conveyed to the defendant.

In the year 1890 one George May, a descendant of William and Peter May, being desirous of preserving the graves of his ancestors and of perpetuating their memory, caused a stone monument bearing a suitable inscription, with the dates of the births and deaths of William and Peter May, to be erected on the 5-acre parcel. At the same time he planted or caused to be planted a hedge intended to surround the part in which the interments had been made.

In 1903 the defendant, soon after the conveyance of the 5-acre parcel was made to him, commenced the erection of a small barn or stable partially upon the plot enclosed by the hedge. He removed the monument from the spot where it had been placed, dug a shallow foundation for the stable, and was proceeding with the building, when, on behalf of some of the plaintiffs, he was notified that they required him to desist. He declined, and this action was brought for an injunction, damages, an order compelling the defendant to restore the

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premises to their former condition, and a declaration that the plaintiffs were entitled to a right of ingress, egress, and regress upon, to, and from the burial plot.

The defendant, besides putting the plaintiffs to proof of their statement of claim and title, objected that the exception in the deed to John Clark was void for uncertainty; that the right to the parcel as a burial plot, if it ever existed, had been abandoned, and that all claim was barred by the Statute of Limitations.

The learned trial Judge gave judgment in favour of the plaintiffs. He found as a fact that there was a burying ground in respect of which the reservation was made in the deed from William May to John Clark; that there was not an abandonment; that the hedge planted by George May in 1890 enclosed a portion at any rate of the original burial plot; and that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot. And he ordered the defendant to remove his buildings and restore the monument to its original site and to pay the plaintiffs \$20 damages. He also declared the plaintiffs entitled to a right of ingress, egress, and regress at all reasonable times for visiting, restoring, and repairing the monument and the enclosures.

The appeal was heard by MOSS, C.J.O., OSLER, MACLENNAN, GARROW, and MACLAREN, JJ.A., on the 26th May, 1905.

H. H. Collier, K. C., for the defendant, appellant. The plaintiffs failed to shew any title to the lands upon which the monument stands. There can be no right of burial on the lands of another which cannot be defeated by the Statute of Limitations. The last interment of which any one speaks was more than 50 years ago. If any member of the May family ever had possession of the lands now alleged to have been the burial plot, they entirely abandoned it more than 50 years ago, since which time the defendant and his predecessors in title were in open, notorious, and undisturbed possession, and continued so until in 1890 George May, the father of two and brother of one of the plaintiffs, entered upon the lands, then in possession of one Harriet Kennedy and occupied by her tenant William R. Irish, for the purpose of erecting the monument in

question, and surrounded it by a hedge, but the hedge was shortly thereafter neglected, and within 5 years from the time it was planted abandoned and allowed to die out. The reservation in the deed by William May to John Clark in 1838 was inoperative, William May not being the owner. There is not only no evidence upon which the limits of the burial plot can be located, so as to identify it with the lands upon which the monument is erected, but the weight of evidence shews that it was situate on the canal bank, a considerable distance from the present site of the monument, and not near the plot enclosed by the hedge. The acts of trespass of George May in 1890 in erecting the monument without the knowledge of Harriet Kennedy and planting a hedge could not give him a possessory title: *Walter v. Yalden*, [1902] 2 K. B. 304. Even if George May and his heirs were held to have acquired a title by possession to the plot, they have acquired no right of way over the defendant's lands to and from the plot. I refer to *Mowry v. City of Providence* (1871), 10 R. I. 52; *Littledale v. Liverpool College*, [1900] 1 Ch. 19; *McIntyre v. Thompson* (1901), 1 O.L.R. 163; *Coffin v. North American Land Co.* (1891), 21 O.R. 80; *Harris v. Mudie* (1882), 7 A.R. 414.

E. E. A. DuVernet and *J. H. Ingersoll*, for the plaintiffs, respondents. Although lot 21 was actually patented by the Crown to Peter May, the trial Judge finds that the 5-acre parcel in which the burial ground was situate, was used by William May as a part of his farm. William had acquired title by possession, and he expressly reserved the burial ground in the conveyance to Clark in 1838. The reservation of a right of way thereto was impliedly made. This conveyance is the defendant's root of title. The plot was dedicated as a burial ground and used for that purpose, and cannot now be diverted to other purposes: *Colbert v. Shepherd* (1892), 89 Va. 401; *Bryce v. Kalbaugh* (1877), 47 Md. 334; *Lay v. The State* (1894), 12 Ind. App. 362. Cemeteries which have once been consecrated are forthwith excluded from secular use: *Campbell v. Paddington* (1852), 2 Rob. Ecc. 558; *The Queen v. Twiss* (1869), L.R. 4 Q.B. 407, 412. In England this protection was extended to unconsecrated cemeteries by 47 & 48 Vict. ch. 72, sec. 3. The trial Judge finds that the plot had not been at any

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time abandoned by the heirs of the persons there buried, and the evidence shews that the fences and enclosures were renewed from time to time. The burial of a body is the only possession necessary; so long as the ground is enclosed as a burial place, or so long as gravestones stand, marking the place as a burial ground, the possession is actual, adverse, and notorious. There cannot be an actual ouster of possession by an intruder, nor running of the Statute of Limitations in his favour, while such gravestones stand there indicating by inscription the previous burial of another: *Hook v. Joyce* (1893), 94 Ky. 450; *Conger v. Treadway* (1892), 132 N.Y. 259. There is reasonable evidence, and the trial Judge finds, that the monument was placed within the old burial plot. The monument and hedge have existed since 1890, and title has been acquired in any event, if it can be acquired by length of possession in such a case. The evidence completely negatives any abandonment. An action for removal of a monument will lie, even if the plaintiff has no title to the freehold: *Mitchell v. Thorne* (1892), 134 N.Y. 536. A private burial ground will not devolve on a devisee, but descends to the heirs for family purposes: *In re Waldron* (1904), 58 Atl. Rep. 453. Reference also to the following cases: *Derby v. Derby* (1856), 4 R.I. 414; *Thompson v. Hickey* (1880), 59 How. Pr. (N.Y.) 434; *Lautz v. Buckingham* (1871), 4 Lans. (N.Y.) 484; *Re McDowell and Town of Palmerston* (1892), 22 O.R. 563, and cases referred to at p. 566; *The King v. Lynn* (1788), 2 T.R. 733; *Regina v. Sharpe* (1857), 7 Cox C.C. 214; *In re Nesbit and Potts's Contract* (1905), 74 L.J. Ch. 310.

Collier, in reply.

October 13. The judgment of the Court was delivered by Moss, C.J.O. (after stating the facts as above):—Upon the argument of the appeal counsel for the defendant did not contend that a particular plot had not been selected and used as a burial ground, but he strenuously argued that upon the evidence the plaintiffs had failed to prove the true site; that the place enclosed by the hedge on which the monument was placed was the place actually used for that purpose. He contended that

the real site was on a point near the edge of the Welland canal, some distance from the place claimed by the plaintiffs.

But the preponderance of evidence is largely in favour of the learned Judge's finding. Apart from the recollection of some aged witnesses, who were present when interments took place, there is the evidence furnished by the appearance of the ground, indicating the presence of graves spoken to by other witnesses; there is also the real evidence of the stone marking the grave of John Pawling, who was a member of the May family, and appears to have been buried in the vicinity of the place where George May put the monument in 1890. There is also evidence of fencing or enclosing the plot and of the continuance in whole or part of fences down to the time when the hedge was planted and afterwards. Benjamin Widdicombe, who put up the monument for George May in 1890, speaks of there being the remains of a picket fence there, and of seeing indications of graves on the surface of the ground—mounds, indentations, and rough stones similar to the one produced, marking the heads of some of the graves. William-H. Irish, who was tenant of the 5-acre parcel under Mrs. Kennedy, a former owner, and whose tenancy began in 1889, gives similar testimony, and he identifies the place where the graves were as that around which the hedge was placed. There is other testimony to the same effect.

The evidence adduced for the defence is rather of a negative character. Witnesses testify that they did not see or notice indications of graves or of fencing at or near the place spoken of by the plaintiffs' witnesses. Another speaks of having been told by John Clark, when he was in possession, of there being a burying ground on the 5-acre parcel, but he says that the site indicated was not that occupied by the monument. Then there was evidence of conversations with some members of the May family indicating uncertainty in their minds as to the exact location of the plot.

But it all falls far short of displacing the case made upon the testimony for the plaintiffs. There is no good reason for thinking that the learned trial Judge should have come to a conclusion contrary to that to which he has given expression.

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In considering the question of the plaintiffs' title, it may be observed that the action, though in form resembling an action to recover possession of or for trespass to land, is not exactly either. It is an action in the nature of a bill in equity on behalf of persons having or claiming to have an estate or interest in a plot of ground set apart and used as a family burying ground in which the bodies of ancestors and relatives are interred, to restrain the destruction, injury, or interference with the graves or the gravestones or monuments upon or over them. The right of the owner of graves to such relief was affirmed in *Moreland v. Richardson* (1856), 22 Beav. 596, and (1857), 24 Beav. 33.

The plaintiffs in the present case have shewn a sufficient interest in or title to the plot to enable them to maintain the action. It being shewn that the plot was set apart and devoted for use as a family burying ground, it is not very material to inquire by whom the original title was held or in which member of the family it was vested at the time of the setting apart.

It is clear that the dedication was recognized by George May, the son and devisee of Peter, the grantee of the Crown, and there is nothing to shew that any attempt was made by any member of the May family to dispose of or otherwise deal with the plot.

The reservation in the deed to John Clark evidences an intention to preserve it from passing into the hands of strangers or from being held save for the purposes to which it had been devoted. The possession—i.e., that species of possession of which a burial plot is susceptible—remained in the May family. As far as appears, there were no subsequent grants affecting the title, and it was suffered to devolve without any disposition of it being attempted.

There was no adverse possession, and no title has been acquired by virtue of the Statute of Limitations. The plaintiffs are heirs-at-law and next of kin of William and Peter May, and as against the defendant they have the superior title. The language of Sir J. Romilly, M.R., in *Moreland v. Richardson*, 24 Beav. at p. 42, is applicable to the circumstances of this case: "It is to be observed, that it is not the plaintiffs who

- seek to obtain possession of the property held by the defendants, but it is the defendants who have taken forcible possession of the property of the plaintiffs, and which they have enjoyed from the time I have mentioned."

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Even if it would avail him, the defendant cannot be heard to say that he had no knowledge of the right to the plot for the purposes for which it was set apart. The deed from William May to John Clark, through whom the defendant claims title to the 5-acre parcel, is notice to him that the plot was devoted to these purposes. He has not pleaded the Registry Act or sought to avail himself of its provisions, and in view of the facts it would have been of no advantage to him. And in justice to him it is but right to observe that in his evidence he disclaimed any wish or intention to interfere with a place of burial. His contention has been and is, that the plot in question is not such a place in fact. That having been determined against him upon the evidence, it may be assumed that he will not wish to interfere with or disturb the graves or the monuments marking them.

The plot being a land-locked piece of ground, reserved out of a grant of the surrounding property, there is an implied way of necessity to and from it, limited to the purposes for which the plot is expressed to be reserved: *Corporation of London v. Riggs* (1880), 13 Ch. D. 798. See also *Turnbull v. Merriam* (1857), 14 U.C.R. 265.

In the present case the right has been reasonably limited to the purpose of visiting the burial plot and restoring and repairing the monuments standing thereon and the enclosures thereof.

The appeal should be dismissed.

E. B. B.

[IN CHAMBERS.]

1905

BAINES V. THE CORPORATION OF THE CITY OF WOODSTOCK

Nov. 10.

ET AL.

Parties—Election as to which Defendant, Plaintiff should Proceed against—Joint Tort Feasors—Con. Rule 186—3 Edw. VII. ch. 19, sec. 609 (O.).

In an action for damages against the corporation of a city for allowing planks and lumber to remain on one of its streets, which had been negligently piled and wrongfully left there by the other defendants, and which fell on the plaintiff and injured him:—

Held, that the defendants were not joint tort feasors and that Con. Rule 186 was not so amended by 3 Edw. VII. ch. 19, sec. 609 (O.) as to authorize the action as constituted, and plaintiff was ordered to elect against which defendant he would proceed.

Hinds v. The Corporation of the Town of Barrie (1903), 6 O.L.R. 656; *Rice v. Town of Whitby* (1898), 25 A.R. 191, and *Chandler and Massey Limited v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 589, followed.

Tate v. Natural Gas and Oil Co. of Ontario (1898), 18 P.R. 82, and *Langley v. Law Society of Upper Canada* (1902), 3 O.L.R. 245, distinguished.

THIS was a motion to compel the plaintiff, who was an infant and who sued by his father as next friend, to elect against which of two defendants he would proceed.

The statement of claim alleged that the plaintiff was injured by reason of a large quantity of planks and lumber, which were negligently piled and wrongfully left by the defendants, the Patricks, on a street in the city of Woodstock; and that the city officials wrongfully and negligently allowed these obstacles to remain on the street for the space of six months.

The plaintiff was only three years old. His leg was broken by the lumber falling on him while he was lawfully using the street in question, and damages of \$1,000 were claimed for the injury.

The motion was heard by the Master in Chambers, on the 9th of November, 1905.

W. M. Douglas, K.C.; for the defendants, the Patricks.

C. A. Moss, for the city of Woodstock.

C. J. Holman, K.C., for the plaintiff.

November 10. THE MASTER IN CHAMBERS:—The motion must succeed unless this case can be successfully distinguished

from *Hinds v. The Corporation of the Town of Barrie* (1903), 6 O.L.R. 656.

Counsel for plaintiff argued that this could be done on two grounds:—

1st. That here the defendants were *joint* tort feorsors.

2nd. That the action as constituted is authorized by 3 Edw. VII. ch. 19, sec. 609 (1), (2), and (3) (O.).

On the first point the argument was that the placing of the lumber on the highway was a joint act, for which both defendants are jointly responsible.

The contrary, however, seems to have been decided in *Rice v. Town of Whitby* (1898), 25 A. R. 191, which shews that if the plaintiff in the present action had been injured before the corporation had had sufficient notice of the obstruction and sufficient time for its removal, though the Patricks might have been liable, the corporation could not have been successfully attacked.

Assuming the statement of claim to be true, then it is clear (1) that there was first a wrongful placing of the lumber on the highway by the Patricks, and (2) a breach of their statutory duty by the corporation in not removing it within a reasonable time.

The plaintiff can proceed against the city and have his action tried as provided by sec. 104 of the Judicature Act, assuming that he has given such notice (if any) as is necessary in some cases; or he can proceed against the Patricks and have his action tried by a jury.

If he adopted the first course, the city could bring in the Patricks as third parties if they saw fit to do so.

But they cannot be sued in one action so long as Rule 186 stands as at present. The tort of the Patricks was in placing the lumber on the highway, for which the city is not liable: the tort of the city consists in not removing it from the highway, and for this the Patricks are not liable.

The more the question is considered, the plainer it becomes that the statement of claim alleges not a joint tort but two separate and distinct torts, the second of which could not be committed until after the lapse of a reasonable time from the commission of the first.

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2. Sec. 609 of the Municipal Act of 1903 was evidently passed in the interests of municipal corporations. Had its object been to amend Con. Rule 186, it would no doubt have been so stated, as was done in the amendment of Con. Rule 162 (*h*) by 5 Edw. VII. ch. 13, sec. 22 (O.).

But there is no mention in sec. 609 of a plaintiff in any place. Opinions may differ as to whether it might not be better to amend Con. Rule 186, as was done when Con. Rule 185 was given its present form. But until this has been done, the decisions from *Sadler v. The Great Western R.W. Co.*, [1896] A. C. 450, onward, must be followed.

Cases like *Tate v. Natural Gas and Oil Co. of Ontario* (1898), 18 P.R. 82, and *Langley v. Law Society of Upper Canada* (1902), 3 O. L. R. 245, were actions on contracts, and were based on *Bennetts v. McIlwraith* [1896], 2 Q.B. 464, and similar cases. But they are not even cited by counsel in *Hinds v. The Corporation of the Town of Barrie*, *supra*, much less mentioned in the judgment of Osler, J.A.

It must, therefore, have been considered by all concerned in that case, so stoutly contested, that those decisions were not relevant. They were decided under Con. Rule 192. There was only one cause of action, and the plaintiff was in doubt against whom he would be able to establish it.

There is no difficulty of that sort in the present case. The plaintiff must elect within a month against which defendant he will proceed, according to the order made in *Chandler & Massey, Limited, v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 589.

There will be a stay of proceedings until after plaintiff has made his election, and the defendant who is retained in the action will have ten days' time to defend after service of the amended statement of claim.

G. A. B.

[DIVISIONAL COURT.]

SLATTERY V. LILLIS.

D. C.

1905

Oct. 13.

Mechanics' Lien—Material Supplied—Request, Privity or Consent or Credit of Owner—R.S.O. 1897, ch. 153, sec. 2, sub-sec. 3 and sec. 4.

Under the Mechanics' Lien Act, in order to create a lien on the property of the owner in favour of the material man, there must in all cases be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. In the circumstances of this case, it was held that the person who had furnished the materials had a direct lien upon the land as against the owner, and not a sub-lien upon the moneys owing by the owner to the contractor or upon the statutory drawback.

Graham v. Williams (1884), 8 O.R. 478; (1885), 9 O.R. 458; *Blight v. Ray* (1893), 25 O.R. 415; *Gearing v. Robinson* (1900), 25 A.R. 364 considered.

THIS was an appeal by Mickle, Dymont & Co., a firm of lumber dealers, from the report of the county Judge of the county of Brantford, sitting as the local Master at Brantford, disallowing their claim against the estate of one James Lillis, deceased, who was the owner of the land in respect of which this action was brought, to enforce the payment of certain mechanics' liens.

The facts are sufficiently set out in the judgment of the Court.

The appeal was argued on the 12th of October, 1905, before a Divisional Court composed of MEREDITH, C.J.C.P., MACMAHON, and TEETZEL, JJ.

A. L. Baird, for the appeal. The evidence shews that the lumber was supplied at the request of the owner, and would not have been supplied otherwise; that credit was given to him, and the charges made in the books for it were bracketted with his name. "Owner" is defined in sec. 2, sub-sec. 3, of the Mechanics' Lien Act, R.S.O. 1897, ch. 153, and when that sub-section is read with section 4, it is evident the property here is subject to the lien. The owner encouraged the lumbermen to supply the lumber: *Blight v. Ray* (1893), 23 O.R. 415, *per* Ferguson, J., at p. 419. He also made a payment on the account. I also refer to *Gearing v. Robinson* (1900), 27 A.R. 364.

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Louis F. Heyd, K.C., called on by the Court on the question, whether there was a lien under the Act. The whole question turns on whether the lumber was supplied on the credit of the owner, and that is not proved. In fact the evidence is the other way, and shews that he never *promised* to pay, and that he handed the money for the first payment to the contractor, who paid it to the lumbermen, who were bound to elect which they would treat as their debtor, and they so treated the contractor and charged the lumber to him. Even if the owner had made a promise to pay such promise would only be collateral to the contractor's promise, and in the event that he did not pay, and it was not in writing.

Baird, in reply.

October 13. At the close of the argument the judgment of the Court was delivered by MEREDITH, C.J.:—The facts of the case appear to be, as we conclude upon the evidence, that a man named Pickett entered into a contract with Lillis, who is now dead, for the erection of a house in the city of Brantford. Pickett was to do the work and furnish all the materials. He became embarrassed during the progress of the work and was unable to procure on his own credit from the appellants, Mickle, Dymont & Co; the lumber required for the building, somewhere about a thousand dollars' worth of which appears to have been required to complete the building.

The evidence shews, we think, that Mickle, Dymont & Co. refused to furnish the lumber upon the credit of Pickett; that that was communicated to the owner of the land, Lillis, who was told that unless he would become answerable for the price of the lumber required by Pickett it would not be supplied; to that Lillis replied either that "you need not be afraid, there will be no trouble about that," or that he would either pay or see them paid for the lumber supplied, and upon that the lumber was supplied.

It was charged in the account of the claimants to the contractor Pickett, the name of Lillis being put in brackets opposite the items of the account, which was a larger one, dealing also with materials supplied for other buildings.

The evidence shews that the first bill was delivered to Lillis and was paid by him. It is shewn that that was a direct payment, and it was a recognition by him, we think, of his direct liability to pay. It is in evidence, that when the second bill was furnished to him he promised to call and pay it, and said that everybody would be paid, and that he had been "put in a hole" in consequence of the conduct of his contractor.

There was evidence also of the architect, that Lillis stated to him that in order to have the buildings completed it would be necessary for him to become responsible to the material men.

The result of this evidence is to make it reasonably plain that there was a request by Lillis that the goods should be furnished, and that his credit was intended to be pledged for the payment for the lumber; that the lumber was supplied upon his promise to pay and at his request, and that he received the benefit of it.

During the course of the argument it was suggested, that what took place might be open to the construction that the promise of Lillis was not a direct promise to pay, but a promise to pay out of the moneys which should be coming to the contractor; in other words, that instead of paying to the contractor, he would pay to Mickle, Dymont & Co., but the evidence upon examination goes a great deal further than that. There is the evidence of the manager of the claimants, of a Miss McGillivray and of her brother, all of which support the conclusion which I have said is the one which we have reached upon the testimony.

One would judge from the notes of the evidence, that the view of the case upon which we proceed was presented for the first time, clearly, at all events, upon the argument before us, and was not presented to the learned Judge. The learned Judge proceeded upon the ground, that the claim of Mickle, Dymont & Co. was one for a personal recovery from the estate of Lillis, as upon an indebtedness of that estate by reason of the furnishing of the lumber. If the case had turned upon that, there would have been no reason to differ from the conclusion of the learned Judge, because the promise which Lillis gave was clearly a collateral one, and the primary debtor was Pickett, and there being no writing evidencing the promise,

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the statute therefore would have been a complete answer to the claim.

The ground upon which we think the appellants are entitled to succeed, is altogether independent of the question whether or not what took place between Mickle, Dymont & Co. and Lillis created an indebtedness for which Lillis or his estate could have been sued. Apart altogether from that question, and granting that that was not the result, nevertheless under the provisions of the Mechanics' Lien Act, R.S.O. 1897, ch. 153, as expounded in the cases, there is given to a person, who has furnished materials under circumstances similar to those under which the materials in this case were supplied, a direct lien upon the property as against the owner, and not a sub-lien upon the moneys payable by the owner to the contractor, or the twenty per cent. which the statute requires to be set apart for the payment of the lien-holders.

The section relied upon is sec. 2, sub-sec. 3, which defines the meaning of the term "owner:"

"'Owner' shall extend to and include any person, firm, association, body corporate or politic, including a municipal corporation and railway company, having any estate or interest in the lands upon or in respect of which the work or service is done, or materials are placed or furnished, at whose request and upon whose credit, or on whose behalf or with whose privity or consent, or for whose direct benefit any such work or service is performed, or materials are placed or furnished, and all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished."

There must be read in connection with this section 4, which creates the lien:

"Unless he signs an express agreement to the contrary," etc., "any person who . . . furnishes any materials to be used in the making . . . of any erection, building, . . . or any of them, for any owner contractor or sub-contractor, shall by virtue thereof have a lien for the price of such work, service or materials upon the . . . building, . . ., and the lands occupied thereby or enjoyed therewith, . . . upon

which such materials are placed, or furnished to be used, limited however in amount to the sum justly due to the person entitled to the lien and to the sum justly owing (except as herein provided) by the owner."

The effect of these sections was considered first by the Chancellor and then by a Divisional Court in the case of *Graham v. Williams*, reported first in (1884), 8 O.R. 478, and afterwards in appeal (1885), 9 O.R. 458. There the claim was by a material man who had supplied bricks to a person who had leased lands from an owner with an option to purchase. The contract for the supplying of the bricks was made between the claimant and the tenant and on the tenant's credit, although the owner was aware that they were being supplied and used in the erection of buildings on the land. The buildings were erected by the tenant under a verbal agreement to that effect between him and the owner subsequent to the lease, by which the owner had undertaken to lend part of the money required for the buildings to the tenant, advancing the same as the work progressed, upon the security of the property. The tenant did not exercise his right to purchase under the lease, and the claimant filed his lien against both the tenant and the owner, and brought action to establish the lien against the interest of both of them. It was held, first by the Chancellor and then by the Divisional Court affirming him, that the interest of the owner in the property was not charged; that it requires something more than mere knowledge of the work being done to bind the owner under the provisions of the Mechanics' Lien Act, and that the privity and consent mentioned in the Act must be in pursuance of an agreement.

The sections were next considered by the late Mr. Justice Ferguson in *Blight v. Ray* (1893), 23 O. R. 415. There, there was a verbal agreement made for the purchase of land, which it was held was sufficient to give in equity the ownership of the land to the buyer. The buyer employed the plaintiff and the defendant Scott (the persons claiming the mechanics' liens) to do work and furnish materials for the erection of a building upon the land. The evidence shewed that during the progress of the work the seller was aware that the work was being done and materials supplied; frequently urged the claimants to go

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on with the work, and promised that they should be paid out of the proceeds of a mortgage, which was to be effected in order to raise money to pay for the building.

The learned Judge held, that what had taken place between the material man and the owner brought the case within the provisions of sub-sec. 3 of sec. 2, which I have read, and that the material man was entitled to a lien upon the interest of the owner in the land. In the course of his judgment, the learned Judge criticizes an expression in the judgment in *Graham v. Williams*, which he quotes at p. 421: "The privity and assent must be in pursuance of an agreement." He did not agree in that, and would have gone a great deal further than that and have held that privity and consent, without any agreement, would be sufficient to fix the owner of the land with liability for the price of the material supplied.

The next case is *Gearing v. Robinson*, 27 A.R. 364, an appeal in a mechanics' lien action from the judgment of the then senior Judge of the county court of the county of York. The judgment of the Court was delivered by Mr. Justice Maclellan, who expounds the meaning of these two sections, expresses the concurrence of the Court in the opinion of the Divisional Court in *Graham v. Williams*, and dissents from or disagrees with the criticism of Mr. Justice Ferguson upon the part of the judgment which he thought was not correct. After dealing with the cases, he says, at p. 371: "I think the language of the sub-section itself calls very strongly for that construction"—that is, the construction that mere knowledge is not enough, mere privity or consent is not enough, unless there is a prior agreement. "What it says is, that the person whose interest is to be charged is to be one at whose request, and certain other things, the work is done, etc.: which means, as I take it, that whatever else there may be, there must be a request, either express, or by implication from circumstances, in order to give rise to the lien. It is section 4 of the Act which gives the lien, and the two sections must be read together. What section 4 says is that the contractor, etc., performing work for any owner, etc., shall have a lien upon the land, etc., upon which the work is done. Reading section 2 (3) with section 4, it would be thus expressed: A contractor

performing work, etc., for any owner, at his request *and* upon his credit, or on his behalf, or with his privity or consent, or for his direct benefit, shall have a lien, etc.," and then he goes on to shew that on the facts of that case, there was no request by the person against whose interest the lien was claimed, nor had the materials been furnished upon his credit.

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It is not quite clear to my mind exactly, how far Mr. Justice Maclellan intended to go in these observations, but this much it seems to me is clear, that in all cases, to bind the owner's interest, there must be the request, the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. If, in addition to the request, one or other of these alternative conditions exist, as I understand the judgment, the lien is created in favour of the material man.

Here the evidence shews that there was the request. There is, I think (although it is not necessary to express a decided opinion upon that) enough to shew that it was upon the credit of the owner in the sense in which those words are used in the Act, although not upon his credit in the sense that any personal obligation was created on his part to the person who supplied the materials. That they were supplied, and it certainly was with his privity and consent, and therefore the case comes within the provisions of the Act.

There is another case (unreported): *Tennant Planing Mill Co. v. Powell*, also a decision of the Court of Appeal,* in which that Court adopted the view of the Divisional Court in *Graham v. Williams*.

We think, therefore, that the claimants are entitled to a lien upon the interest of the owner for the price of the lumber which was supplied for the building and which has not already been paid for. There is no dispute, I think, as to the amount, some \$462, and therefore the judgment of the learned local Master will be set aside and for it will be substituted a judgment declaring the rights of the parties according to our view, with consequent relief.

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We think it is not a case in which there should be any costs of the contest below or of this appeal to either party. Lillis is dead, and the difficulty which has arisen has occurred largely owing to the neglect of the claimants to put into writing or to preserve some evidence of the arrangement which we have found was entered into. Then, as I have said, the ground upon which we determine the case in favour of the claimants does not appear to have been brought, clearly at all events, to the attention of the learned Master. For these reasons we think the costs should be dealt with in the way I have indicated.

G. A. B.

[MEREDITH, C.J.C.P.]

RE PROVINCIAL GROCERS LIMITED.

CALDERWOOD'S CASE.

1905

Nov. 20.

Company — Winding-up — Contributory — Subscription for Shares — Contract under Seal — Offer — Acceptance — Allotment — Notice.

The respondent, by a writing under seal dated the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay \$100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the company should draw upon the respondent for the amount payable on application. On the next day, and before anything had been done by the company, the respondent wrote to the company, cancelling his subscription. The company drew on the respondent for the 10 per cent., but he refused to accept the draft, and, being pressed by the company by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by sec. 71 of the Ontario Companies Act to be kept by the company, as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory:—

Held, following *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that payment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shewn that the acceptance was communicated to him; and he was not, therefore, liable as a contributory.

AN appeal by the liquidator of the company from the order of an official referee, dated the 12th September, 1905, in the course of a reference for the winding-up of the company, dismissing a motion made by the liquidator to place John Calderwood, the respondent, on the list of contributories. The facts are stated in the judgment.

The appeal was heard by MEREDITH, C.J.C.P., in the Weekly Court, on the 16th November, 1905.

G. M. Clark, for the liquidator, the appellant.

J. E. Jones, for the respondent.

The contentions of counsel are indicated in the judgment.

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The following authorities were referred to: *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481, at p. 489; Pollock on Contracts, 7th ed., p. 50; Anson on Contracts, 10th ed., p. 39; *Xenos v. Wickham* (1867), L.R. 2 H.L. 296.

November 20. MEREDITH, C.J.:—The question for decision is, whether the respondent was in fact a shareholder in the company in respect of one share of its capital stock, of \$100.

The respondent by an instrument in writing under seal, bearing date the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay \$100 for it, as follows: "10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors" might deem advisable.

The arrangement made by the respondent was that the company should draw upon him for the ten per cent. payable "on application," and there is a memorandum to that effect on the face of the instrument.

The respondent on the following day, and before anything had been done by the company, wrote to it cancelling his subscription.

The company drew on the respondent for the ten per cent. payable on application, but he refused to accept the draft.

On the 16th September, 1903, the company wrote to the respondent informing him that the bank had notified the company that his draft "for \$10 (being ten per cent. of subscription for one share of Provincial Grocers, Limited)" had been returned, and informing him that it was thought that the draft was allowed to come back through error on the part of the respondent, and that the bank had been requested to present it again, and that it was hoped the respondent would protect it,—a vain hope, however, as the respondent again declined to accept.

On the 8th September, 1903, a resolution was passed by the directors in the following form: "That the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment."

The company did not draw on the respondent for the second payment, and the fair inference is, I think, that the respondent

was not notified that the share for which he had subscribed was allotted to him.

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The name of the respondent is recorded in the book required by sec. 71 of the Ontario Companies Act (R.S.O. 1897, ch. 191), to be kept by the company, as a shareholder, holding one share ; and *prima facie*, therefore, the respondent is a shareholder and the holder of one share.

No further application appears to have been made to the respondent for payment in respect of his share, and there is no evidence that he received any notice of the calls which were subsequently made upon the shareholders, nor any notice of any meeting of shareholders, one of which at least was held before the winding-up order was made, and it does not appear that after the refusal for the second time to accept the draft for the down payment, he was in any way treated or dealt with as a shareholder.

The position which the respondent occupied was not, in my opinion, that of one who had made a mere offer or proposal to take shares and therefore entitled to recall his offer before it had been accepted. The instrument which he signed was not a mere offer or proposal but a subscription under seal for one share, with a covenant to pay for it in the manner mentioned in the instrument, and his position is therefore to be ascertained according to the principles upon which the Court of Appeal acted in *Nelson Coke and Gas Co. v. Pellatt*, 4 O.L.R. 481.

In order, however, that the respondent should become a shareholder, it was necessary that the company should do something equivalent to an acceptance, something either by words or conduct which satisfies the Court that the offer had been accepted to the knowledge of the person who made it.

Of this I am not satisfied, notwithstanding the presumption against the respondent, to which I have referred.

Looking at all the circumstances, the proper inference is, I think, that the company never accepted or intended to accept the respondent as a shareholder unless the down payment of ten per cent. was made, and that, after the definite refusal of the respondent to make that payment, the company made it evident that it had not accepted his offer. The fact that it did not draw upon him for the second payment, that no further effort was

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It follows from what I have said that, even if the other requirement to fix the respondent with the liability of shareholder, i.e., that the company had accepted the offer of the respondent, were satisfied, it is not shewn that the fact that the company had done so was communicated to him.

The appeal will, therefore, be dismissed, with costs to be paid by the appellant to the respondent.

T. T. R.

[IN THE COURT OF APPEAL.]

THE CORPORATION OF THE TOWN OF OAKVILLE V. ANDREW.

C. A.

1905

June 22.
Oct. 13.

Partnership—Dissolution of—Evidence—Continued Use of Firm Name—Omission to give Notice of Dissolution or File Certificate—Treasurer of Corporation—Mixing of Funds—Liability.

On the evidence set out in this case a partnership in a private banking business which had existed between the defendant and one H. was held to be dissolved; but, as the business continued to be carried on in the firm name, and no notice of the dissolution was given, or any certificate thereof under the Copartnership Act R.S.O. 1887, ch. 130, sec. 7, was filed, the defendant's liability to persons dealing with the firm continued.

After the dissolution of the partnership, H., who was also treasurer of a municipal corporation, received, as such, moneys belonging to the corporation, out of which, and other moneys, he made certain payments for the corporation and deposited the balance in a chartered bank where the firm kept its account, subsequently using it in the firm's business:—

Held that the defendant was not liable therefor, for in dealing with the moneys H. did so either as the corporation's authorized agent or in breach of his duty; if as agent, his knowledge that the defendant was not a partner must be attributed to the corporation; and, if in breach of his duty, his improperly mixing them with his own moneys, in which the defendant had no interest, could not render the defendant liable.

THIS was an action to recover the sum of \$8,795.17 alleged to have been deposited by the plaintiffs with the banking firm of Andrew & Howarth, it being claimed that defendant was at the time a member of the firm and liable for the indebtedness, and interest thereon from 1st December, 1902.

The action was tried before FALCONBRIDGE, C.J.K.B., without a jury at Milton on April 11th, 1904.

G. F. Shepley, K.C., and D. O. Cameron, for the plaintiffs.

E. F. B. Johnston, K.C., and C. Millar, for the defendant.

In 1881 the defendant George Andrew and one Thomas Howarth entered into partnership for the purpose of carrying on a private banking business at the town of Oakville under the name of Andrew & Howarth. Prior thereto the defendant had carried on the business of an auctioneer and had lived in Oakville for twenty-seven years. The partnership continued until 1st November 1890, when, according to the defendant, it was dissolved, Howarth continuing the business alone.

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Thomas Howarth was also the plaintiff's treasurer, and as such received all moneys belonging to the corporation, out of which, and other moneys, he made payments for the corporation, and deposited the balance in the Ontario Bank where the firm kept its account, which was subsequently used in the firm's business.

The plaintiffs contended that the partnership was not dissolved in December, 1902, but continued, and that the defendant was liable for its obligations.

The additional evidence, so far as material, is set out in the judgment of Moss, C.J.O.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment :

June 22. FALCONBRIDGE, C.J.:—Since the argument, namely, on the 9th May last, there has been produced a certified copy of declaration of partnership as follows :

" We, the undersigned, of the town of Oakville, in the county of Halton, hereby certify that we have carried on and intend to carry on trade and business as private bankers, etc., under the name, style and firm of Andrew & Howarth, at Oakville, in partnership, and that the said partnership has existed since the third day of November, one thousand eight hundred and eighty-one, and that we are and have been since the said day the only members of the said partnership.

" Witness our hands at Oakville, this twenty-ninth day of April, one thousand eight hundred and eighty-one.

" Witness— (Sgd.) Geo. Andrew.

" (Sgd.) E. J. Hagman. " Thos. Howarth."

which declaration was registered on the 3rd May, 1882.

By R.S.O. 1897, ch. 152, sec. 7, it is provided that until a new declaration is made and filed by him or by his co-partners, or any of them, no person who shall have signed the declaration filed shall be deemed to have ceased to be a partner.

But Mr. Miller, in a memorandum accompanying a copy of the certificate, contended that the document had no effect upon the questions involved because the partnership between Howarth and Andrew was for banking purposes and not for trading, manufacturing, or mining purposes, and that therefore the statute did not apply.

I am of the opinion that this contention is not well founded. The English Bankruptcy Act, 1883, does not contain any description of traders; but the Act of 1869 did. Bankers were there specifically included in the description, and Mr. Robson (*Law of Bankruptcy*, 7th ed., p. 124) thinks that possibly the description under the Act of 1869 may be held to be applicable to the Act of 1883. In *Hall v. Franklin* (1838), 3 M. & W. 259, the trade of a banker was held to be within the meaning of the statute 57 Geo. III. ch. 99, which restrained spiritual persons from being occupied in any trade or dealing. And in *Bagnell v. Hamilton* (1864), 10 U.C.L.J.O.S., a banker was held to be a trader within the meaning of the Insolvent Act 1864.

This seems to conclude the case against the defendant. There is also abundant evidence of partnership in fact. And I think that the application which was made of the plaintiffs' money, or a large portion thereof, would bring the case within the principle of *Re Hallett's Trusts* (1879), 13 Ch. D. 696.

On all grounds there must be judgment for plaintiffs with costs.

From this judgment the defendant appealed to the Court of Appeal.

On April 25, 1905, the appeal was heard before Moss, C.J.O., OSLER, MACLENNAN, GARKOW and MACLAREN, JJ.A.

C. Millar, for the appellants.

Shepley, K.C., and *D. O. Cameron*, for the respondents.

The arguments sufficiently appear from the judgments.

October 13. The judgment of the Court was delivered by Moss, C.J.O.:—The plaintiffs in this action sue the defendant as a co-partner of one Thomas Howarth, deceased, in the business of private bankers in the town of Oakville.

Thomas Howarth was for several years prior and up to the time of his death on the 1st December, 1902, the treasurer of the municipality of Oakville, and it was his duty to receive all moneys belonging to the corporation.

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The plaintiffs allege that the defendant and Howarth were for many years prior to, and during the year 1902, carrying on in partnership the business of private bankers in Oakville, under the name and style of Andrew & Howarth, and that moneys belonging to the plaintiffs were deposited with the firm or employed by Howarth in the business of the firm or were paid in discharge of liabilities of the firm; and they claim that the defendant is liable to them for the amount of moneys so dealt with.

The defendant denies the existence of the alleged partnership and all liability to the plaintiffs.

The action was tried by the learned Chief Justice of the King's Bench without a jury.

It appeared that the defendant and Howarth entered into partnership as private bankers in November, 1881, and it is not disputed that the partnership continued until November, 1890. But the defendant contends that the partnership was then dissolved by mutual consent, and that thereafter the business was carried on by Howarth alone and for his sole benefit. His testimony on this point is supported by the circumstances.

During the period between November, 1881, and November, 1890, the business was carried on in premises situate in the lower or down town part of Oakville. And during this time the defendant appears to have taken an active part in the conduct of the business, dealing with customers and transacting business in the banking house after the manner of a proprietor. Upon or about the time of the dissolution there was a removal into new premises situate in another part of the town. And from that time the defendant was not so frequently on or about the premises, nor did he appear to concern himself in or about the conduct of the business in the same manner and to the same extent as before. Some acts tending to shew that he continued to exercise the right of a partner were deposed to, *e.g.*, that on some occasions he was to be seen behind the counter examining the collection books: that he asked questions concerning notes and customers of the bank, and that on several occasions he signed the firm name of Andrew & Howarth to cheques and drafts given to customers of the business. And it is undisputed that the firm name was continued as formerly.

The defendant's explanation is that at Howarth's request he permitted his name to remain in the style of the firm, believing Howarth to be trustworthy and reliable, and that he was incurring no real risk; that in the course of his own business as auctioneer he was in the habit of discounting notes given by purchasers; that he placed these notes and others for collection in the bank, and that from time to time when he enquired about their collection he was referred by Howarth to the collection book and told to look for himself and that the enquiries he made were chiefly with reference to these notes and the parties upon them.

With reference to signing cheques or drafts he testified that upon occasions when Howarth was intending to be absent from the town for some days he would leave a number of cheques or drafts signed in blank with Mrs. Howarth to be used in the business; and he also requested the defendant, that in case there were others required during his absence, to sign any presented by Mrs. Howarth. In this way he signed cheques or drafts at Mrs. Howarth's request.

This testimony is corroborated to some extent by Arthur W. Howarth, one of the plaintiff's witnesses. Mrs. Howarth was not called, and, although Howarth's two sons and a daughter who were employed in the business at different periods, were all called in reply, after the defendant had given his testimony, no questions were asked of them in contradiction of the defendant's statements on this point.

It may therefore be fairly concluded that the explanation given by the defendant is correct. And it should be found as a fact that the defendant signed the cheques or drafts, not as a partner, but at the request of Howarth and for his convenience only.

This conclusion upon the evidence is strongly corroborative of the defendant's contention that the partnership had been dissolved. Else why in Howarth's absence, if not at other times, should the defendant not be found conducting the business instead of Howarth's wife, and what necessity was there for any signed cheques or drafts being left or for any request to defendant to sign others if necessary? If the defendant was a partner there was no necessity for the arrangements that

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appear to have been always made for the conduct of the business while Howarth was away.

The proper conclusion of fact appears to be that the partnership between the defendant and Howarth was in fact dissolved by mutual consent in November, 1890, and that thereafter Howarth was carrying on the business in the name of Andrew & Howarth but on his own account and for his sole benefit.

No notice of the dissolution was given either by public advertisement or circulars to customers or by the filing of a declaration of dissolution in the manner provided by the Act respecting the registration of co-partnerships, R.S.O. 1887, ch. 130, sec. 7.

It was shewn that the moneys for which the plaintiffs are seeking to hold the defendant liable were received for the plaintiffs by one C. L. Young, the tax collector and harbour master of the town, and represented taxes and harbour fees received by him during the year 1902. These he paid over to Howarth as town treasurer, whose duty it was to receive them on behalf of the plaintiffs, and he gave receipts therefor to Young in the proper form.

There can be no pretence that Young was intending to place the moneys otherwise than in Howarth's hands as treasurer of the town, or that Howarth was receiving them otherwise than in his capacity of treasurer. The payments made by Young to Howarth were in no sense deposits in the bank or with the firm, nor were they moneys received by the bank or the firm in the course of its business. And in making the payments Young was in no manner or way dealing with the bank or the firm or relying upon the defendant's name. Howarth received the moneys in his individual capacity as town treasurer and in the course of his duty. And they did not come into the possession of the banking concern through any act of Young. Howarth appears to have placed them with moneys received from other sources in a till in the office or counting house, and out of the mass to have made some payments on account of the plaintiffs. When a considerable sum had accumulated in the till he made up a deposit and sent it to the Ontario Bank at Toronto where it was placed to the credit of an account headed "Andrew &

Howarth," but it was really Howarth's account kept in connection with his business in Oakville. The moneys in this account were applied in payment of Howarth's business liabilities to the bank and others. At his death the account was overdrawn and he was largely indebted to the bank in respect of advances on notes discounted and collaterally secured by customers' notes.

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The learned Chief Justice gave judgment in favour of the plaintiffs, chiefly on the ground that the defendant in consequence of his failure to file a declaration of dissolution of partnership must be deemed to be a partner. He also expressed the view that there was abundant evidence of partnership in fact; and further that the application made of the plaintiffs' money would bring the case within the principle of *Re Hallett's Trusts* (1879), 13 Ch. D. 696.

It was argued on the defendant's behalf that it was not obligatory upon him to file a declaration of dissolution, and that the failure to do so did not render him liable to the consequences declared by sec. 6 of R.S.O. (1887), ch. 130, to follow failure to file a declaration of change in the membership or name of the membership.

It is not necessary to place a construction upon the provisions of the Act because the absence of any notice and the continued use of the defendant's name rendered him liable to be treated by all persons dealing with the firm as still a member of the firm. The filing of a declaration was one mode of giving notice to the public, and the defendant neglected this as well as the usual common law methods of freeing himself from future liability to persons dealing with the firm.

But the difficulty in the plaintiffs' case is that they were not customers and were not dealing and did not deal with the firm in the transaction now in question. Howarth received the moneys from Young not as a banker but as town treasurer. And the plaintiffs are not entitled to look to the defendant for repayment simply on the ground of his apparent membership in the firm or of his having allowed himself to be held out as a partner with Howarth in the latter's banking business.

As said by Lord Esher, M.R., in *In re Fraser, Ex p. Central Bank of London*, [1892] 2 Q.B. 633 at p. 637: "The

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doctrine of 'holding out' is a branch of the doctrine of estoppel. If a man holds himself out as a partner in a firm, and thereby induces another person to act upon that representation, he is estopped as regards that person from saying that he is not a partner. The representation may be made either by acts or by words; but the estoppel can be relied upon only by the person to whom the representation has been made in either way and who has acted upon the faith of it."

The question then is, can the use subsequently made by Howarth of the moneys render the defendant liable, he being in fact not a partner and the original dealing not being with the firm?

If it be said that Howarth, after receiving the moneys as treasurer, deposited them in his bank, he did so either as the authorized agent of the plaintiffs or in breach of his duty as treasurer. If he acted as the authorized agent of the plaintiffs he knew at the time that the defendant was not a partner, and his knowledge should be attributed to the plaintiffs. If he acted in his own wrong he improperly mixed them with his own moneys in which the defendant had no property. There being no partnership in fact Howarth was not the defendant's agent in any way to deal with the plaintiffs' moneys, nor could the defendant interfere with Howarth in his control over or dealing with them. He had no notice of any intention on the part of Howarth to commit a wrong upon the plaintiffs or to misapply their moneys. Miss Howarth said in evidence that she told defendant that they went to the Ontario Bank, but that would not constitute notice to the defendant of an intention to misapply them so as to make him party to a breach of trust in respect of them. And even if he were a partner in fact with Howarth, the latter's dealings with the moneys even though they benefitted the firm, would not render the defendant liable unless he was aware that they were being applied to partnership purposes: *Ex p. Heaton* (1819), 2 Bro. C. C. 386.

But in this case the moneys were applied by Howarth to his own purposes. It may be that some of them went in discharge of a debt to the Ontario Bank for which the defendant was liable to the bank, but, as between the defendant and Howarth, the debt was the latter's, and the fact that he chose to pay

it in part with the plaintiffs' money cannot create any privity between them and the defendant.

The incidental advantage which the defendant may have derived from Howarth's wrongful act is not such a participation in a breach of trust as to render him liable therefor: see *Thomson v. Clydesdale Bank*, [1893] A.C. 282, at p. 287; *Coleman v. Bucks, etc., Bank*, [1897] 2 Ch. 248.

There is no fund or property now in existence into which it is possible to trace any of the plaintiffs' moneys. Before the commencement of these proceedings the moneys at the credit of the account of Andrew & Howarth had been paid out. There is nothing to which the plaintiffs can point as a mixed fund out of which they can ask the Court to extricate their moneys by the application of the principle enunciated in *In re Hallett's Trusts (supra)*.

For these reasons the appeal should be allowed and the action dismissed with costs.

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Nov. 21.

REX V. COLLETTE.

*Criminal Law—Vagrancy—Conviction—Evidence—Criminal Code, sec. 207 (1)—
Habeas Corpus—Discharge.*

The evidence upon which a magistrate's conviction of the defendant under sec. 207 (1) of the Criminal Code for vagrancy was based, was, that, though never convicted, he was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create suspicions of his honesty. There was no evidence offered by the Crown that he had no means of earning a livelihood; and evidence of his being recently employed as an hostler was given on his behalf. He had \$40 on his person when arrested:—*Held*, that, if there was some evidence that the defendant "for the most part supported himself by crime," there was no evidence to warrant a finding that he had "no peaceable profession or calling to maintain himself by;" and he was discharged upon the return of a *habeas corpus*.

MOTION for the discharge of the prisoner upon the return of a *habeas corpus*. The facts are stated in the judgment.

The motion was heard by ANGLIN, J., in Chambers, on the 21st November, 1905.

W. S. Brewster, K.C., for the prisoner.

J. R. Cartwright, K.C., for the Crown.

November 21. ANGLIN, J.:—The present motion is made upon the return to a writ of *habeas corpus* for the discharge of the prisoner Collette, serving a sentence of four months' imprisonment under conviction by the police magistrate for the city of Brantford, "for that he on the 6th day of October, 1905, was a vagrant, not having any peaceable profession or calling to maintain himself by, for the most part supporting himself by crime."

Collette was arrested at the Commercial Hotel, Brantford, on the 6th October. He had arrived in that city from Montreal two days before, with a man named Percy Brown, who appears to have a well-established criminal record. Both shared the same room at the hotel, and their baggage consisted of a single suit case used in common. On Collette's person was found \$40.40 in money.

Daniel McLaughlin, a detective from Montreal, gave evidence that Collette, though never convicted, was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create a suspicion that his honesty may not be indisputable. Upon a former occasion he had when arrested stated his name to be Lennox. A marked list of Canadian fall fairs was found in his valise, etc. There was no evidence offered by the Crown that he had no means of earning a livelihood. On the contrary, for the defendant evidence was given by one Thompson, an engineer of the Montreal street railway, that the prisoner had been in his employment as an hostler for the past two seasons, and during the present year from March or April until some time in the month of August, earning \$8 per week.

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Section 207 of the Criminal Code reads as follows:

"Every one is a loose, idle or disorderly person or vagrant who . . . (1) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution."

The evidence would not at all warrant a conviction under any of the other sub-clauses of sec. 207.

Assuming that, weak and unsatisfactory though it be, there is some evidence that Collette "for the most part supports himself by crime," there is, in my opinion, no evidence to warrant a finding that he is a person "having no peaceable profession or calling to maintain himself by." The order for discharge must therefore be granted as asked.

E. B. B.

[IN CHAMBERS.]

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Nov. 25.

RADFORD V. BARWICK ET AL.

Practice — Close of Pleadings — Lapse of Time — Direction of Court — Rules 263, 612.

The noting of the pleadings as closed being a mere preliminary step to a motion for judgment or other kindred relief to ensue thereupon, by analogy to the practice prescribed by Rule 612, the officer of the Court should not, notwithstanding the terms of Rule 263, in any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted became entitled to that relief, note the pleadings closed without the direction of the Court or a Judge; and, unless in exceptional circumstances, that direction should not be given without notice to the party to be adversely affected by such noting.

MOTION by the plaintiff, *ex parte*, for a mandatory order directing the Clerk of Records and Writs to note the pleadings in this action closed, as against the defendants who had made default in delivery of statements of defence.

The application was made under Rule 263, and was heard by ANGLIN, J., in Chambers, on the 24th November, 1905.

John MacGregor, for the plaintiff.

November 25. ANGLIN, J.:—This action was commenced on the 18th November, 1891. The statement of claim was delivered on the 18th February, 1892. A statement of defence and counterclaim on behalf of one of the defendants, Harry E. Caston, was delivered on the 26th February, 1892. Although appearances were entered for the other defendants upon the record, F. D. Barwick, Walter Barwick, and Moss, Barwick, and Franks, a firm composed of Charles Moss, N. W. Hoyles, Walter Barwick, A. B. Aylesworth, W. J. Franks, Douglas Armour, and H. J. Wright, no statement of defence appears to have been delivered on behalf of any of these defendants. The defence of the defendant Caston appears to be the last proceeding which has been taken in this action. For reasons which are unexplained upon the material filed, the plaintiff has allowed the action to lie dormant for upwards of 13 years. Under these circumstances the Clerk of Records and Writs, upon the plaintiff's application to him, declined to note the pleadings

closed without the direction of a Judge. Therefore the plaintiff has launched the present motion.

Notwithstanding the imperative language of Rule 263, and the absence in our Consolidated Rules of any provision corresponding with Order 64, Rule 13, of the English Rules of the Supreme Court, I am of opinion that the attitude taken by the Clerk of Records and Writs was entirely proper, and I am further of opinion that no such direction as that without which the Clerk has declined to act, should be given except upon notice to the parties to be affected thereby.

Under the practice prevailing at common law before our Judicature Act, where either party to an action had taken no proceeding in a suit for a year, a term's notice of intention to proceed was required. In Chancery, where a defendant personally served within the jurisdiction of the Court with a bill of complaint, had neglected to answer or demur thereto within one month from the time of service, unless the plaintiff within six months took action to have the pleadings noted *pro confesso* in the registry, he was not permitted to have the pleadings so noted, but was required to serve a notice of motion for an order that the bill be taken *pro confesso*: *Brown v. Baker*, 1 Ch. Ch. 7; Chancery Orders 104 and 105.

In *Beaver v. Boardman* (1882), 9 P.R. 239, the learned Master in Chambers held that the former common law practice had been abrogated by the Judicature Act. He also expressed the view that there was "no such practice in the Chancery practice" existing when the Judicature Act was introduced. His attention does not appear to have been called to the Chancery Orders 104 and 105, to which I have alluded, and to the practice established under these Orders. In the course of his judgment he expresses the opinion that the "omission to provide for such a notice (as was required by the common law practice) in the Rules was intentional, and that the intention was to introduce the Chancery practice on this point, which would, of course, leave it open to the Courts to relieve in any special case."

I cannot but think that, while the order of the learned Master refusing to give effect to the application of the defendant in the case before him to set aside proceedings for want of a

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term's notice, as required by the old common law practice, was undoubtedly right, his views as to the necessity of some notice being given, where there had been unreasonable delay upon the part of a party seeking to proceed with the action, would have been different had his attention been called to the Chancery Rules above alluded to.

In the course of his judgment the learned Master said: "The truth is that all Courts have such a general control over their proceedings as to enable them to prevent, in any particular case, injustice under such circumstances being inflicted by one party upon the other. . . . One party would not be allowed to spring upon the other when he was off his guard."

In *Webster v. Myer* (1884), 14 Q.B.D. 231, Lindley, L.J., says: "The fact of more than a year having elapsed since the last proceeding, seems to shew that the plaintiff had intended to abandon the prosecution of the action, and it might be very unjust to allow him to sign judgment without giving the defendant an opportunity of establishing to the satisfaction of the Court that the plaintiff is not entitled to proceed further." This reason seems to afford the strongest possible ground for preventing possible abuse of the process of the Court by persons proceeding with actions which they have allowed to lie dormant for such a length of time that they may well have created the impression that they intended forever to abandon them.

Under our practice a party against whom pleadings are noted for default is not entitled to notice of any subsequent proceedings: Rule 586. It is improper to move for judgment upon default of defence until pleadings have been noted closed under Rule 263, against the defaulting party: *Alexander v. Alexander* (1901), 1 O.L.R. 639. The plaintiff, therefore, only becomes entitled to move for judgment upon such default after he has had the pleadings noted, and to this case therefore Rule 612 would probably not be applicable. That Rule reads: "Except by leave of the Court or a Judge, an action shall not be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down same first became entitled so to do."

If, without noting the pleadings closed, the plaintiff were entitled to set this case down upon a motion for judgment, Rule

612 would effectually prevent his doing so without the leave of the Court or a Judge. It cannot, in my opinion, have been intended that he should be entitled to have the pleadings noted closed under Rule 263, without the leave of the Court or a Judge, though more than a year had expired from the time when he became entitled to have that step taken, and that he should thus be enabled to put himself in a position to move for judgment without leave, because his right to so move had only accrued when he had secured the noting of the pleadings.

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In the exercise, therefore, of the inherent jurisdiction which the Court must possess to so control its proceedings as to prevent them being made the instrument of possible injustice, I must decline to make the order asked for, notwithstanding the terms of Rule 263. The noting of pleadings being a mere preliminary step to a motion for judgment or other kindred relief to ensue thereupon, by analogy to the practice prescribed by Rule 612, the officer should not, in my opinion, in any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted, became entitled to that relief, act under Rule 263 without the direction of the Court or a Judge; and, unless in exceptional circumstances such as induced the Court to make a similar direction *ex parte* under the old Chancery practice (*Kerr v. Clemmow*, 1 Ch. Ch. 14; *Hare v. Smart*, *ib.* 350*), such direction should not be given except upon notice to the party to be adversely affected by such noting.

I would also point out that at least one of the parties to this action, Mr. W. J. Franks, a member of the firm of Moss, Barwick, and Franks, has died since the last proceeding was taken, and that there has been more than one transmission of interest in that firm. It is probable, therefore, that without an order of revivor the plaintiff is not in a position to proceed with this action. No such order has been put in evidence.

E.B.B.

* The cases in this volume of reports are undated; they were decided between 1858 and 1866.

[DIVISIONAL COURT].

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Oct. 30.

JOHNSTON V. BARKLEY ET AL.

Judgment—Procurement by Fraud and Perjury—Right to Attack in Subsequent Action—Fraudulent Assignment—Action to Set aside—Res Judicata—Garnishing Proceeding in Division Court.

When it can be shewn that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and such fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case.

In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded *res judicata*, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a division court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial Judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the division court proceeding, who was one of the defendants in the action, procured from the Judge in the division court an adjudication that the assignment was valid:—

Held, that the plaintiff was entitled to impeach the judgment in the division court, though he had not directly attacked it, as he should have done by amendment when *res judicata* was pleaded; and, upon the evidence, that the assignment was fraudulent and void.

Abouloff v. Oppenheimer (1882), 10 Q.B.D. 295, and *Vadala v. Lawes* (1890), 25 Q.B.D. 310, followed.

Woodruff v. McLennan (1887), 14 A.R. 242, and *Hilton v. Guyot* (1895), 159 U.S. 113, not followed.

Judgment of ANGLIN, J., reversed.

ACTION to set aside an assignment of salary by the defendant Nora Barkley to the defendant Zenas Barkley as fraudulent and void against the plaintiff and other creditors of the defendant Nora Barkley.

The action was tried before ANGLIN, J., without a jury, at Cornwall, on the 22nd November, 1904.

J. Leitch, K.C., and *J. A. C. Cameron*, for the plaintiff.

G. I. Gogo, for the defendants.

December 6, 1904. ANGLIN, J.:—The plaintiff is a creditor of the defendant Nora Barkley, a school teacher, who by assignment dated the 16th February, 1904, assigned to her

father-in-law, her co-defendant, Zenas Barkley, her salary for the year 1904. This present action is brought to set aside this assignment as fraudulent and void as against the plaintiff and other creditors of Nora Barkley. The only substantial defence is raised by a plea of *res judicata*, founded upon a judgment of the 3rd division court in the united counties of Stormont, Dundas, and Glengarry, in a garnishee proceeding, to which the present plaintiff and defendants were parties—the plaintiff as primary creditor, the defendant Nora Barkley as primary debtor, the other defendant, Zenas Barkley, as claimant under the above mentioned assignment. Upon the hearing of this garnishee summons in the division court the validity of this assignment was the question for determination. By suppressing material facts and by giving evidence that was wilfully false the claimant succeeded in securing from the learned junior Judge an adjudication that the garnishees (the board of school trustees) were not indebted to the primary debtor. The primary creditor moved for a new trial. In dismissing this application the learned Judge expresses his opinion that the defendant Zenas Barkley is thoroughly honest and that the assignment to him was made in perfect good faith. How such a conclusion was reached, even upon the partial statement of facts before the division court Judge, I find it difficult to understand. A more glaring and palpable case of a fictitious assignment for a fraudulent purpose can scarcely be imagined than that disclosed before me at the trial of this action.

But I am not sitting in appeal from the judgment pronounced in the division court, and since that judgment has “the same force and effect as a judgment of a court of record,” with regret I am obliged to give effect to the defendants’ plea of *res judicata*.

Though not obtained in a direct proceeding between plaintiff and defendant as such, this division court judgment, disposing of proceedings taken under sec. 202 of the Division Courts Act, is, I think, clearly within the purview of sec. 7 of that statute, and therefore equivalent to a judgment of a court of record. See *Re Perras v. Keefer* (1892), 22 O.R. 672; *Radford v. Merchants Bank* (1883), 3 O.R. 529; *Dingwall v. McBean* (1900), 30 S.C.R. 441.

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Mr. Leitch strongly urged the fraudulent means taken by the present defendants to procure the judgment in the division court as an answer to their plea of *res judicata*, the fraud consisting in perjury. I am not able to agree with his contention. Mr. Kerr, in the third edition of his valuable work on Fraud and Mistake, says at p. 301 : "Whether an innocent party would be allowed to prove in one Court that a judgment against him in another Court was obtained by fraud, is a question not equally clear." Though it is well established that a fraudulent judgment collusively obtained binds no Court (*Earl of Bandon v. Becher* (1835), 3 Cl. & F. 479), I find no authority for holding that an innocent party against whom, while present and defending his interests, or after a due notice, judgment has been recovered by fraudulent means, can, while such judgment stands, be heard in another Court to assert its invalidity upon that ground. The jurisdiction of any Court, in a direct action brought for that purpose, to set aside its own judgment obtained by fraud, is well established : *Cole v. Langford*, [1898] 2 Q.B. 36 : but, even in such an action, the Court which has been imposed upon will not itself, upon the mere proof that a verdict and judgment have been obtained by perjury, set aside such judgment : *Baker v. Wadsworth* (1898), 67 L.J.Q.B. 301 ; *Flower v. Lloyd* (1877), 6 Ch. D. 297, (1878), 10 Ch. D. 327. *A fortiori* in another Court such proof will not be sufficient to induce it to treat the judgment so obtained as a nullity. "It is the unquestioned doctrine of the cases that a party to a judgment cannot impeach it collaterally on the ground that false testimony was given at the trial, on which testimony the judgment was rendered : " Black on Judgments, 2nd ed., sec. 296.

While constrained, therefore, giving effect to the defendants' plea of *res judicata*, to dismiss this action, I mark my sense of their dishonesty by refusing to allow them costs.

The plaintiff appealed from the judgment of ANGLIN, J., and the appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., FALCONBRIDGE, C.J.K.B., and STREET, J., on the 15th February, 1905.

J. Milden, for the plaintiff, contended that in the circumstances of the case, and having regard to the findings of the trial Judge, the plea of *res judicata* could not avail the defendants. He cited *Alison's case* (1873), L.R. 9 Ch. 1, 24; *Barber v. McCuaig* (1900), 31 O.R. 593; *Brunsdon v. Humphrey* (1884), 14 Q.B.D. 141.

G. H. Watson, K.C., for the defendants, supported the judgment of Anglin, J., referring to *Baker v. Wadsworth*, 67 L.J. Q.B. 301; Kerr on Fraud, 3rd ed., p. 301; *Bugbee v. Clergue* (1900), 27 A.R. 96; *Hollender v. Ffoulkes* (1894), 26 O.R. 61; *Woodruff v. McLennan* (1887), 14 A.R. 242; *Re Perras v. Keefer*, 22 O.R. 672; *Radford v. Merchants Bank*, 3 O.R. 529; *Davidson v. Belleville and North Hastings R.W. Co.* (1880), 5 A.R. 315; *Bigelow v. Staley* (1864), 14 C.P. 276.

Milden, in reply, cited *Cole v. Langford*, [1898] 2 Q.B. 36; *Birch v. Birch* (1901), 86 L.T.N.S. 118; *Re Nilick v. Marks* (1900), 31 O.R. 677.

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October 30. STREET, J.:—In my opinion the appeal in this case should be allowed. The decisions in the English Courts treat as applicable to both foreign and domestic judgments the principle that when it can be shewn that a judgment has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and further, that such a fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the Court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit: *Abouloff v. Oppenheimer* (1882), 10 Q.B.D. 295; *Vadala v. Lawes* (1890), 25 Q.B.D. 310; *Cole v. Langford*, [1898] 2 Q.B. 36. I do not find the cases upon the subject to turn upon the difference suggested in an article in the *Law Times*, vol. 105, p. 123, headed "Judgments Obtained by Fraud," between judgments obtained by extrinsic fraud and those obtained by perjury at the trial. I think we should follow the later English cases rather than that of *Woodruff v. McLennan*, 14 A.R. 242, which was decided in the face of *Abouloff v. Oppenheimer*, but before the later cases in England. See

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Hollender v. Ffoulkes, 26 O.R. 61. Many cases upon the subject, both English and American, are collected and elaborately reviewed by the Supreme Court of the United States in *Hilton v. Guyot* (1895), 159 U.S. 113; see especially pp. 207-8-9.

The present action is not actually brought to set aside the former decision in the division court, but it attacks the same assignment which that Court upheld. The decision of the division court is pleaded as *res judicata*, and, instead of amending and attacking the judgment upon the ground of fraud, the plaintiff merely joined issue upon the defence. The whole of the evidence, however, which could have been given had the action been brought to declare the judgment not binding upon the plaintiff because of the fraud, was received at the trial, and the whole question has been argued before us as if the action had been properly framed for the purpose, and there would be no object to be gained by sending the record back for formal amendment and re-trial. There is much evidence, both new and material, before us in the present case, which was not before the learned Judge in the division court, and which could not by reasonable diligence, I think, have been discovered before the trial in that court; and the result of it is to leave no doubt upon my mind that the decision in the division court was procured by gross perjury and fraud and was unjust to the plaintiff.

I can see no way by which the plaintiff could have remedied his position by any proceeding in the division court in which the judgment complained of was rendered: *Re Nilick v. Marks*, 31 O.R. 677. The broad principle laid down in *Abouloff v. Oppenheimer* is that our Courts will not allow a judgment which can be clearly shewn to have been obtained by fraud to be enforced; that principle was there applied in the case of a foreign judgment, but it is said to be equally applicable to judgments obtained in England; and I see no reason for holding that a judgment in a division court is to be exempted from the operation of the principle.

It is obviously necessary in order to prevent an abuse of the right to have a judgment re-opened upon the ground of fraud, that the fraud should be that of the party who has obtained the judgment; that it should be clearly made out; and that it should have undoubtedly been at the foundation of the decision

which has been attacked; and the attacking party must be prepared to shew this upon an application to stay his action as frivolous and vexatious: *Boswell v. Coaks* (1894), 6 R. 167; *Birch v. Birch*, [1902] P. 62, 130.

In coming to my conclusions I follow *Abouloff v. Oppenheimer* and *Vadala v. Lawes*, which draw no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case. This distinction is recognized by the Supreme Court of the United States in the case of *Hilton v. Guyot*, above referred to, and by our own Court of Appeal in *Woodruff v. McLennan*, also above referred to, but the House of Lords does not seem to have had the question presented to it as yet. Meantime there is no doubt that the wide doctrine which appears to be the result of the English and American cases at present, impairs to a very considerable extent the finality of all judgments.

In my opinion, the judgment for the defendants should be set aside and judgment should be entered for the plaintiff for other relief prayed, with costs here and below.

FALCONBRIDGE, C.J.:—I agree.

MEREDITH, C.J.:—I agree with the judgment of my brother Street, though if we were not bound by the decided cases in England and in this Province to hold otherwise, I should probably come to the conclusion that a more correct principle is enunciated by the Supreme Court of the United States in *Hilton v. Guyot*, 159 U.S. 113, in accordance with which the judgment of my brother Anglin was pronounced.

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Nov. 4.

CITY OF TORONTO v. TORONTO R.W. CO.

Street Railways—Operation of Cars—Fender—"Front" of Motor Car—Penalty
—1 Edw. VII. ch. 25 (O.)

By 1 Edw. VII. ch. 25, sec. 1 (O.), it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender:—" *Held*, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined, were liable to the penalty prescribed by the statute. Judgment of the county court of York affirmed.

APPEAL by the defendants from the judgment of the county court of York, dated the 15th April, 1905, pronounced by the senior Judge of that Court, after the trial of the action before him sitting without a jury, on the 12th April, in favour of the plaintiffs.

The action was brought to recover penalties imposed by the Ontario statute 1 Edw. VII. ch. 25, an Act to amend the Street Railway Act, R.S.O. 1897, ch. 208. The facts are stated in the judgments.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., ANGLIN and CLUTE, JJ., on the 20th October, 1905.

J. Bicknell, K.C., for the defendants, appellants.

J. S. Fullerton, K.C., for the plaintiffs, respondents.

The arguments are sufficiently indicated in the judgments.

November 4. MEREDITH, C.J.:—The action is brought to recover penalties imposed by the Act 1 Edw. VII. ch. 25, for alleged violations of the following provisions of sec. 1:—

"The company, when operating any portion of its line by means of electricity, shall from time to time adopt and use in the front of each motor car a fender, which shall be of a design approved of by the Lieutenant-Governor in Council from time to time upon a report by the engineer of the Department of Public Works for Ontario as suitable for use by the company,

having regard to the efficiency of such fender for life saving purposes, and to the location of the company's line, and the speed at which the company's cars may be run."

The appellant company is a company to which the section quoted applies, and was operating its line upon the upper or northern part of Avenue road by means of electricity on the days upon which, according to the judgment appealed from, it incurred the penalties sued for.

The motor car in use was equipped at one end with a proper fender, and it was furnished with a controller situate at one end of the car, at which the motorman stood, and by means of which he directed and controlled the movement of the car; there was no fender attached to or in use at the other end of the car.

The car was propelled northward along Avenue road with the end at which the controller and fender were placed in front, until the car reached Dupont street, where it "Y" ed, then returned to Avenue road and was propelled northward on that street with the end which had been towards the south facing north, to the terminus of the line on Avenue road, a distance, as stated on the argument, of about twelve hundred feet, stopping to take on and let off passengers at intersecting streets as occasion required.

While the car was thus proceeding northwards, there was no fender upon the northerly end of it, and the question for decision is whether in so operating the car the appellant company was guilty of a violation of the provisions of sec. 1, as the learned Judge of the county court has held that it was.

It is plain that if what was done did not constitute a violation of the statute, the protection to life which the legislation was designed to afford is or may be rendered useless at the will of the railway company.

It is not necessary to determine whether if it should become necessary in operating a car proceeding in a particular direction to bring it to a stop and to move it backwards over a part of the line that it had passed over, the doing of this without having a fender upon the end of the car that had been the rear end when the car was advancing, would constitute a violation of the Act; but I am of opinion that the learned Judge of the

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county court was right in holding that in operating their line on the northerly part of Avenue road, as the appellant company was operating it on the days in question, the Act was violated.

If, instead of moving the car as it was being moved for a part only of Avenue road, the appellant company had chosen to move all their cars in that way upon the whole of Avenue road, or even upon every street upon which their cars were run, would it be possible to say that the Act was not violated? I think not; and if the question be asked why not? I should answer, because what under ordinary circumstances and speaking of the car as a thing not in motion would constitute the rear and not the front of it had become by the act of the appellant company the front of the car.

Surely speaking of a car as a moving thing the Legislature must have intended that that end of it which would be nearest to a person moving in the opposite direction to the car and which would first come into his view should be deemed to be the front of it. Giving to the section that meaning does no violence to its language, taken in its natural and ordinary meaning, having regard, as regard must be had, to the clearly expressed purpose of the legislation.

If the contention of the appellant company is right, what must be held to be the "front" of a car having controllers at each end, which is operated when going in one direction by the controller at one end and when making the return journey by the controller at the other, and what would be the front of the car if the controller were placed midway between the two ends? Such considerations as these—and others might be suggested—lead to the conclusion that what is meant by the front of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction.

The appeal should, in my opinion, be dismissed with costs.

ANGLIN, J.:—The defendants appeal from the judgment of the senior Judge of the county court of York holding them liable for penalties under the provisions of the statute 1 Edw.

VII. ch. 25. For a period of twenty days the electric street cars of the defendants ran northerly upon a portion of Avenue road in the city of Toronto, for a distance of twelve hundred feet, with fenders attached only to the ends of the cars which were towards the south. This the learned county court Judge held to be an infraction of the statute, which reads as follows:

"The company, when operating any portion of its line by means of electricity, shall from time to time adopt and use in the front of each motor car a fender, which shall be of a design approved of by the Lieutenant-Governor in council from time to time upon a report by the engineer of the Department of Public Works for Ontario as suitable for use by the company, having regard to the efficiency of such fender for life saving purposes, and to the location of the company's line, and the speed at which the company's cars may be run."

The appellants contend that in the case of "single-ended" cars, such as were used upon Avenue road, the "front" of the car is always, however the car may be moving, the end at which the controller is placed and from which the motorman operates. If this contention should prevail, I see nothing to prevent the company successfully defending a claim for penalties in respect of the operation of such cars in the same way in which these cars were run, at any time and for any distance upon any of the streets of the city. If the end of the car at which the controller is placed is, in all circumstances, the "front" of the car, then the front of a "single-ended" car travelling up Yonge street with the motor reversed from Front street to the Canadian Pacific Railway tracks at North Toronto would be its rear or southern end. It is, it seems to me, only necessary to state such a case to shew conclusively the fallacy of Mr. Bicknell's contention.

It is unnecessary to deal with the case of the reversal of a car effected by the motorman not for the purpose of taking such car to its destination according to its regular and prescribed route, but to meet some unexpected or unforeseen emergency. It may be that to such a case the statute would not be applicable. But where in travelling its regular route a "single-ended" car is operated reversely, I have no doubt that the front of such car while so operated is, within the meaning

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of the statute under consideration, that end of the car which is ordinarily the rear, but which, as it travels, is the foremost part. As such it must, to comply with the requirements of the Act, be equipped with a fender. The judgment below should therefore in my opinion be affirmed, and this appeal dismissed with costs.

CLUTE, J., concurred.

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[DIVISIONAL COURT.]

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Oct. 19.
Oct. 31.

CUTTEN ET AL. V. MITCHELL ET AL.

Discovery — Production of Documents — Affidavit — Partnership — Master and Servant — Agreement to Share Profits — Statement Furnished by Master — Fraud.

Held, by ANGLIN, J., in Chambers, that, notwithstanding the language of sec. 3 of R.S.O. 1897, ch. 157, a statement of profits furnished by a master to his servant, where there is an agreement to share profits, is impeachable for fraud; and fraud being alleged by the plaintiffs (servants) in an action (*inter alia*) for an account of profits, the plaintiffs were entitled to discovery of a document in the possession of the defendant (master) shewing the basis of the statement of net profits furnished by the defendant:—

Held, by a Divisional Court, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action.

AN appeal by the defendant Mitchell from an order of the Master in Chambers requiring the appellant to make a further and better affidavit on production. The facts are stated below.

The appeal was heard by ANGLIN, J., in Chambers, on the 6th October, 1905.

C. A. Moss, for the appellant.

R. McKay, for the plaintiffs.

October 19. ANGLIN, J.:—The action is brought for an account of profits of an alleged partnership, and in the alter-

native the plaintiffs allege an agreement made between themselves as employees, and the defendant Mitchell as employer, by which they became entitled to defined shares in the net profits of the business carried on by Mitchell, and claim an account of such profits.

The defendant Mitchell by his plea denies the alleged partnership and also the special agreement set up by the plaintiffs. As an alternative plea he says that such special agreement (if any) is within the provisions of the Master and Servant Act, R.S.O. 1897, ch. 157; that statements or returns of the net profits of the business in question were furnished to the plaintiffs, and payments made them of the sums to which by such statements they were shewn to be entitled; and that under sec. 3* of the statute the statements so furnished are "final and conclusive between the parties thereto . . . and shall not be impeachable upon any ground whatever." In his examination for discovery, however, Mitchell admits the agreement entitling the plaintiffs to share in net profits, as alleged in the 10th paragraph of the statement of claim. In their reply the plaintiffs charge that the statements furnished them were *false* and *fraudulent*. Particulars of the charge of fraud having been demanded, the plaintiffs served the following notice: "Take notice that the plaintiffs intend to give evidence at the trial of this action that the premises and figures from which the alleged

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*3. It shall be lawful in any trade, calling, business, or employment, for an agreement to be entered into between the workman, servant, or other person employed, and the master or employer, by which agreement a defined share in the annual or other net profits or proceeds of the trade or business carried on by such master or employer, may be allotted and paid to such workman, servant, or person employed, in lieu of or in addition to his salary, wages, or other remuneration; and such agreement shall not create any relation in the nature of partnership, or any rights or liabilities of co-partners, any rule of law to the contrary notwithstanding; and any person in whose favour such agreement is made, shall have no right to examine into the accounts, or interfere in any way in the management or concerns of the trade, calling, or business in which he is employed under the said agreement or otherwise; and any periodical or other statement or return by the employer, of the net profits or proceeds of the said trade, calling, business, or employment, on which he declares and appropriates the share of profits payable under the said agreement, shall be final and conclusive between the parties thereto and all persons claiming under them respectively, and shall not be impeachable upon any ground whatever.

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statement or return of net profits was deduced are false, and that the details of such premises and figures lie in the knowledge of the defendant Mitchell, and the plaintiffs are unable to give them until the defendant Mitchell has given discovery thereof."

No further steps to enforce delivery of particulars appear to have been taken.

On examination for discovery the defendant Mitchell admitted that he had in his possession a document drawn up to embody the terms of an arrangement between the parties to this action. Upon this admission the learned Master in Chambers very properly determined that Mitchell's affidavit on production was incomplete because it omitted all reference to this document. Upon the argument of the appeal, however, the document itself was produced. By consent of Mr. McKay (without which I would not have done so) I made a personal inspection of the document, and upon such inspection was satisfied that the defendant Mitchell was not bound to produce or account for it in his affidavit.

In answer to another question the defendant Mitchell admitted possession of a statement shewing the basis upon which the sum of \$8,500 accounted for as net profits of the business had been arrived at. This statement the defendant has not produced. It is alleged to be relevant upon the issue of fraud raised by the reply.

Mr. Moss argued that the statement or return of net profits furnished by an employer to his employee is, under sec. 3 of R.S.O. 1897, ch. 157, not impeachable for fraud. Mr. McKay maintained the contrary proposition. No authority was cited by either of the learned counsel, both stating that this statutory provision had not yet been the subject of judicial construction.

Notwithstanding the sweeping terms in which the statute declares the finality of statements furnished by the employer, I cannot conceive that it was thereby intended to render fraudulent statements conclusive and unimpeachable.

Nulla pactione effici potest ut dolus præstetur is a familiar maxim in the law of contracts. A man cannot effectually contract in advance for immunity from the consequences of his own fraud. No general words in a contract will be read as

intended to afford such immunity. Such terms as "*nullis exceptis*," commonly found in foreign policies of marine insurance, are invariably construed as not negating an exception of fraud on the part of the assured.

In *Tullis v. Jacson*, [1892] 3 Ch. 441, although he held that an agreement between parties to a building contract that the awards of an architect shall be final and binding and shall not be set aside or attempted to be set aside on any ground or for any reason or for any pretence, suggestion, charge, or insinuation of fraud, collusion, or confederacy, precluded any impeachment of such architect's certificates for fraud to which the defendant, the owner, was not a party, Chitty, J., expressed the view that the result would have been different had complicity of the owner been established.

In the absence of express language rendering a statement furnished by his employer, in cases within the purview of R.S.O. ch. 157, sec. 3. unimpeachable for fraud upon his part, I cannot hold that the employee is precluded by the general words of the statute, broad as they undoubtedly are, from attacking it upon this ground.

But is a mere allegation of fraud in his employer's statement to entitle an employee to the production of documents relating to the employer's business which he would otherwise have no right to see or examine? At all events until fraud is proved, the employer's statement is final and conclusive.

It is impossible to say that, if the plaintiffs' charge of fraud is well founded, the production of the document, possession of which the defendant Mitchell admits, may not help them to prove that charge. The question of fraud is in issue. Unless the plaintiffs abandon their charge, it must be determined at the hearing. In aid of a proper presentation of their case the plaintiffs seek discovery by production. They are *prima facie* entitled to it: *Graham v. Temperance and General Life Ass'ce. Co. of N.A.* (1895), 16 P.R. 536; *Sheppard Publishing Co. v. Harkins* (1904), 8 O.L.R. 632. On the other hand, if, having had such production, they should fail to substantiate the charge of fraud, they will have been allowed access to a document which in that case they had no right to see. But the Court cannot try an issue to determine the right to discovery which is

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is alleged to be requisite to the fair presentation of such issue itself: *Duncombe v. Davis* (1841), 1 Hare 184, 189. The materiality of the discovery sought must be determined upon the assumption that the case of the party seeking it is true: *Gresley v. Mousley* (1856), 2 K. & J. 288, 292. It is better that this defendant should be required to produce a document, which in the ultimate event of this action it may appear that he is strictly entitled to withhold, "than that honesty and fair dealing should appear to be violated with impunity:" *Smith v. Hunt* (1901), 1 O.L.R. 334, 335.

I am therefore of opinion that upon this branch I cannot disturb the order of the learned Master. The order will stand as a general order for a further and better affidavit on production according to the usual practice.

How far the plaintiffs will have improved their position should they succeed in proving the statement already furnished them to be false and fraudulent—what in that event will be their rights and remedies in view of the provisions of the statute—are questions upon which I express no opinion.

The appeal having failed upon one point, and having succeeded on the other, solely because of the opportunity afforded me of perusing the document in demand, the costs should be costs to the plaintiffs in the cause.

The defendant Mitchell appealed from the order of ANGLIN, J., and the appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and CLUTE, JJ., on the 30th October, 1905.

H. Guthrie, K.C., and *C. A. Moss*, for the appellant.

R. McKay, for the plaintiffs.

October 31. THE COURT gave judgment dismissing the appeal with costs, holding that, having regard to the general rules governing discovery, and to the fact that the document in question was probably material upon the plaintiffs' partnership claim, it was proper that it should be produced. The Court did not pass upon the question with regard to sec. 3 of R.S.O. 1897, ch. 157, dealt with by Anglin, J.

[At the trial of the action on the 7th November, 1905, before ANGLIN, J., without a jury, he found that the plaintiffs were not partners of the defendants; and, adhering to the view above expressed, that the statement furnished by the defendant Mitchell was impeachable for actual fraud, he held upon the evidence adduced that actual fraud was established in respect of one item, namely, a charge made by Mitchell of \$2,500 per annum for five years' salary. By express agreement with the plaintiffs, Mitchell's salary was to have been \$1,500 per annum. The fact that he had made this excessive charge of \$5,000, and withdrawn that sum from the net profits otherwise distributable between the two plaintiffs and the two defendants, was not disclosed by Mitchell to the plaintiffs. The statement furnished did not shew it. Construing the statute, the learned Judge held that the plaintiffs were bound by the statement furnished in regard to everything except the item in respect to which they had established actual fraud. He refused to order a general accounting by the defendants, or that a new statement of net profits should be furnished to the plaintiffs. He directed judgment to be entered for the plaintiffs for payment to them by the defendants of their respective proportions of the sum of \$5,000, profits fraudulently taken by the defendant Mitchell, under the guise of salary, in addition to the sums to which the statement furnished shewed the plaintiffs to be entitled.]

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[IN CHAMBERS.]

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Oct. 9.

RE JAMES BAY R. W. CO. AND WORRELL ET AL.

Railway—Expropriation of Land—Owner—Trustee—Notice.

A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of sec. 71 of the Dominion Railway Act, 1903; and notice under that section must be served upon all the *cestuis que trust*.

MOTION by the railway company under sec. 170* of the Dominion Railway Act, 1903, for a warrant for immediate possession of certain lands. The facts appear in the judgment.

The motion was heard by ANGLIN, J., in Chambers, on the 6th October, 1905.

R. B. Henderson, for the applicants.

J. A. Worrell, K.C., for a trustee of the lands.

A. W. Ballantyne, for two of the beneficial owners.

October 9. ANGLIN, J. :—This is a motion for a warrant or order for immediate possession of certain lands, made under sec. 170 of the Dominion Railway Act. Notice has been given by the company to the trustee in whom the legal estate in the lands is vested, and to two out of five of the beneficial co-owners. All the *cestuis que trust* are *sui juris*. It was stated before me and not denied that the trustee is in every sense a bare trustee, and that he holds the lands merely to convey the same as and when his *cestuis que trust* may direct.

In my opinion, he is not "the owner of the land or the person empowered to convey the land, or interested in the land

* By sec. 169 of the Act, upon payment of the compensation awarded or agreed upon, the award or agreement shall vest in the company the power forthwith to take possession of the lands; and if opposition is made, the Judge shall issue his warrant to put the company in possession, etc.

170. Such warrant shall also be granted by the Judge without such award or agreement, on affidavit to his satisfaction that the immediate possession of the lands . . . is necessary to carry on some part of the railway with which the company is ready forthwith to proceed.

sought to be taken," within the meaning of sec. 171 † of the Railway Act. It follows that the warrant asked cannot be granted, owing to the failure of the company to give notice to the other *cestuis que trust*.

If the railway company will now take such steps that this application may, after proper notice, be heard concurrently with an application in respect of parcel "O," which Mr. Henderson stated he is now in a position to make, this motion may stand over for the purpose of giving proper notice. If the railway company decline to proceed in this way, the present motion will be dismissed with costs.

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† The Judge shall not grant any warrant under the next preceding section, unless ten days' previous notice of the time and place when and where the application for such warrant is to be made has been served upon the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken . . .

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Oct. 10.

PAYNE V. PAYNE.

Husband and Wife—Alimony—Cruelty—Insufficient Evidence of—Non-revival of Prior Condoned Acts.

The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of a husband arising out of the wife's headstrong and irritating conduct, and will refuse, unless such acts are accompanied by intemperate and excessive violence, to call them acts of cruelty, and so effective in reviving prior condoned acts of cruelty and misconduct.

In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from defendant, and carrying on what she called a hospital for pregnant women. In 1904 on the defendant insisting on it, the plaintiff returned to the defendant's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and during the defendant's temporary absence, stripped the defendant's house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendered it unsafe for her to live with him, and revived prior condoned acts of cruelty and misconduct;—*Held*, that the defendant's acts were not of such an excessive and intemperate a character as would render it unsafe for the plaintiff to live with him, and revive the prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated, but was brought on by the plaintiff herself, whose whole object was to goad the defendant into acts of violence which would justify an action for alimony.

THIS was an action of alimony tried before his Honour Judge Macbeth, county Judge, sitting as Judge of the High Court, at London, on February 3rd, 1905.

J. F. Faulds, and *J. H. Campbell*, for the plaintiff.

E. Meredith, K.C., and *R.-M.-G. Toothe*, for the defendant.

The plaintiff and defendant were married in 1895, but had been living together for some years prior thereto, and during the ten years of their married life they had only lived together at intervals for about three years in all.

Acts of adultery on the part of the defendant were proved, as also of his having assaulted the plaintiff, but they were all condoned. In one case sending back to live with him a woman with whom she knew he had committed adultery. The defendant had also been addicted to drunkenness, but had not been so for the last six years.

The plaintiff had been carrying on what she called a hospital for pregnant women at one time in Cleveland, and at another time in Detroit.

In March, 1894, the defendant wrote the plaintiff to come back at once and live with him. She came back in May. Everything went on satisfactorily for about ten days, when the plaintiff wanted the defendant to allow her to carry on her female hospital business in the house, which he refused to do as he said he did not approve of it. The plaintiff then said that if the defendant persisted in his refusal she would leave the house and rent a house herself where she would carry it on, which she did. The defendant said he did everything he could to persuade her to remain, but she refused.

On 4th June the defendant went to town, leaving early in the morning. On his return he found a carter there commencing to remove the furniture out of the house for the purpose of taking it to the plaintiff's house, when he stopped him, but allowed him to take the plaintiff's trunks. On the 16th June while the defendant was again absent she stripped the house of nearly all the furniture taking it to her own. She came back in the evening with one of the daughters, and laid down in a bed which had been left there. The defendant on coming in and finding her there and the house stripped, was very much incensed, and told her to leave, and on her refusal to do so, and on her calling him foul names, he pulled her out of the bed, and on her getting into it again, he caught hold of the clothes and pulled them off the bed drawing her with them to the ground, whereby she claimed she was seriously hurt. It did not appear that any blows were struck.

The learned Judge in his finding reviewed the evidence, coming to the conclusion that the plaintiff's account was a very exaggerated one, and that the defendant did not treat her with such cruelty as to prove it was not safe for her to live with him; that the prior acts of misconduct were not revived, and that her separation from the defendant was her own voluntary act, that she came back after the removal of the furniture for the express purpose of aggravating the defendant and making evidence to

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justify the bringing of the action, and he gave judgment for the defendant.

From this judgment the plaintiff appealed to a Divisional Court.

On September 26th the appeal was heard before BOYD, C., MEREDITH and MAGEE, JJ.

W. E. Middleton and *J. F. Faulds*, for the appellant. The evidence shews that the defendant was on June 16th guilty of gross acts of violence and cruelty, the effect of which was to revive the prior acts of cruelty and misconduct. There was therefore ample evidence to shew that it was not safe for the plaintiff to live with him, and that she was justified in leaving him and claiming alimony. In *Durant v. Durant* (1825), 1 Hagg. Ecc. 733, at p. 761, it was held that acts of cruelty not nearly so pronounced as are shewn here would revive the prior acts of cruelty and misconduct, and the same principle is laid down in numerous other decisions: *Exp. Aldridge* (1858), 1 Sw. & T. 88; *Bostock v. Bostock* (1858), 1 Sw. & T. 221, 224; *Curtis v. Curtis* (1858), 1 Sw. & T. 192; *Rodman v. Rodman* (1873), 20 Gr. 440; Bishop on Marriage and Divorce, sec. 722; *Palmer v. Palmer* (1859), 2 Sw. & T. 61; *Aldrich v. Aldrich* (1891), 21 O.R. 447; *Bavin v. Bavin* (1896), 27 O.R. 571; Nelson on Marriage, sec. 437; *Gardner v. Gardner* (1854), 2 Gray, (Mass.), 434, 441; *Regina v. Jackson*, [1891] 1 Q.B. 671; *Russell v. Russell*, [1897] A. C. 395. The case of *Collins v. Collins* (1884), 9 App. Cas. (H.L.Sc.) 205, would seem to qualify the principle laid down in *Durant v. Durant*. There it was held that condonation is absolute and unconditional, and is a bar to any claim subsequently made in respect of such acts. In that case, however, the court was distinguishing between the English and Scotch law on the subject, and were dealing with *Durant v. Durant* in that view.

E. Meredith, K.C., and *R. M. C. Toothe*, for the respondent. The judgment of the trial Judge should not be disturbed. The plaintiff and defendant during the ten years of their married life lived but three years together, the plaintiff preferring to live apart from the defendant, and to carry on the hospital

business, and she connived at her husband's acts of misconduct, in one case actually sending back to live with him one of the women with whom she knew he had committed adultery. Then, when, at the defendant's demand, she comes back, the whole trouble is caused by her attempt against his will to carry on the hospital business in the house. The defendant had good ground for being incensed when he found the house stripped of the furniture. No such assault was committed or acts of cruelty proved as would justify her in believing that her life was in danger. The act of leaving was her own voluntary act, and the trial Judge has expressly found that, after stripping the house, she came back for the express purpose of arousing the defendant's anger and getting him to do something that would afford evidence on which she could maintain an action for alimony. Nothing that took place here would have the effect of reviving the previous acts of misconduct and alleged cruelty. Upon the authorities the plaintiff's action fails: *Synge v. Synge* (1900), 83 L.T.N.S. 224; *Fitzgerald v. Fitzgerald* (1869), L.R. 1 P. & D. 694; *Regina v. Cookham Union* (1882), 9 Q.B.D. 522; *Plowden v. Plowden* (1870), 23 L.T.N.S. 266; *Best v. Best* (1823), 1 Addams Ecc. 411; *Waring v. Waring* (1813), 2 Phil. Ecc. 132; *Sickert v. Sickert* (1899), 81 L.T.N.S. 495.

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October 10. BOYD, C.:—The turning point of this case is what happened just before this action was brought. The case of the plaintiff was that she was then, on the 16th June, treated with such cruelty by her husband as demonstrated it was not safe for her to live with him, and that, besides, his cruel conduct revived old acts of conjugal misconduct, which of themselves were enough to entitle her to alimony had they not been condoned.

The occurrences of that evening in June are detailed by four witnesses who give very diverse accounts—on one side the husband and his son, and on the other the mother and her daughter. The learned Judge who tried the case has set forth the details and comes to the conclusion that a very exaggerated account is given for the plaintiff, and he prefers to accept the version given for the defendant; and sitting in appeal I do not

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see on what ground this question of credibility can be reviewed. The account of the condition of the plaintiff as seen by persons later in the evening do not throw much light on what really occurred and do not shew that any blows were inflicted on the woman. True, she was laid hold of and dragged from the bed and was in some way hurt on her calling him foul names and upon her refusal to leave the house, but I am inclined to think that the true view of the whole situation was that she came with her daughter (as a witness) on purpose to provoke the altercation and so gain evidence to justify a charge of cruelty. Her prior conduct in dismantling the house, renting other premises to conduct some kind of medical concern, against the wish and command of her husband, and returning that evening in the absence of her husband to the dismantled tenement and placing herself dressed in the bed suggests some such explanation as this.

She had left the house and bed before this voluntarily and returned for what purpose at that hour, if not to provoke a quarrel and to incite him to such act of violence as would give her a status in Court? The Court scrutinizes very closely acts of alleged violence which grow out of headstrong and irritating conduct on the part of the wife. She will not gain the help of the Court when she misconducts herself; provokes ill-treatment and then makes complaint that it is not safe to live with her husband. The Court will hesitate to call retaliatory acts thus provoked to be acts of legal cruelty unless the ill-behaviour of the wife has been visited with intemperate and excessive violence by the incensed husband.

In this case the acts of violence as proved to the Judge fall short of intemperate and excessive character and were by him accounted as not disproportionate to the ill-deserts of the wife.

The line of cases in the Ecclesiastical Courts such as *Best v. Best*, 1 Addams Ecc. 411, and *Waring v. Waring*, 2 Phil. Ecc. 132 is in point to support the judgment.

I think the appeal fails and should be dismissed. The husband is willing and offers to receive back his wife—if she accepts this and returns, it will be open for her to complain if he fails to observe the duties of a husband in treating her as she deserves.

MEREDITH, J.:—The plaintiff's claim is a preposterous one. Desiring and intending to live separate and apart from her husband, she set up an establishment of her own, and then deserted him and despoiled his house, returning there again for the purpose of goading him into violence so that she might bring this action for separate maintenance, based upon such violence, and taking her daughter with her as a witness. Separate maintenance is awarded to a wife whose life or health is jeopardized by her husband's misconduct towards her, notwithstanding her willingness to perform her matrimonial duties; not to her who has deserted her home, and who seeks to make the Court a party to her efforts to obtain alimony by trickery.

MAGEE, J., concurred.

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ROGERSON V. CAMPBELL

Nov. 3.

Will—Construction—Restraint on Alienation—Exercise of Power.

A testator devised land to his daughter subject to the following conditions:—
“My said daughter shall not sell or will or dispose of this 100 acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dispose of it if it is her will to do so.”

By her will, the daughter assumed to charge upon the land two legacies, and directed that her husband might occupy the land for one year after her death, and subject to these charges, and her debts and testamentary expenses, devised the land to her executors upon trust for the plaintiff, one of the testator's grandchildren, as beneficial owner. There were several other children and grandchildren of the testator surviving:—

Held, that the restraint on alienation in the testator's will was valid, and that, inasmuch as the daughter's will must be held to have been made by her in pursuance of the power of disposition given her by him, though she intended to defeat the restraint against alienation by indirect means, the legacies in her will failed, as also her devise of the right of occupation in favour of her husband, and the plaintiff took the whole property free from any condition.

THIS was an action to obtain a declaration that the plaintiff was entitled, free from certain charges, to a piece of land in the township of Innisfil, under the circumstances set out in the judgment. The action was tried at Barrie, on October 12th, 1905, by ANGLIN, J.; sitting without a jury.

H. H. Strathy, K. C., for the plaintiff, referred to *In re Macleay* (1875), L.R. 20 Eq. 186; *Smith v. Faught* (1881), 45 U.C.R. 485, 488; *O'Sullivan v. Phelan* (1889), 17 O.R. 730; *In re Rosher*, *Rosher v. Rosher* (1884), 26 Ch. D. 801; *Re Winstanley* (1884), 6 O.R. 315; *Re Bell* (1899), 30 O.R. 318; *Earls v. McAlpine* (1881), 6 A.R. 145; *In re Turner*, *Turner v. Turner* (1902), 4 O.L.R. 578; *Churchill v. Churchill* (1867), L.R. 5 Eq. 44; *Webb v. Saddler* (1873), L.R. 8 Ch. 419; *Armour on Real Property*, pp. 170-171; *Theobald on Wills*, 4th ed., p. 504; *Jarman on Wills*, 5th ed., p. 858.

H. Lennox, for the defendants the executor of the estate of Isabella Campbell, her husband and her adopted child, referred to *Evans v. King* (1893), 23 O.R. 404, 410; *Heddlestone v. Heddlestone* (1888), 15 O. R. 280; *Re Shanacy v. Quinlan* (1897), 28 O.R. 372; *Armstrong v. McAlpine* (1879), 4 A.R. 250; *Meyers v. Hamilton Provident and Loan Co.* (1890),

19 O.R. 358; *Farrell v. Farrell* (1867), 26 U.C.R. 652; *In re Dugdale, Dugdale v. Dugdale* (1888), 38 Ch. D. 176; *Attwater v. Attwater* (1853), 18 Beav. 330.

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November 3. ANGLIN, J.:—The plaintiff sues for a declaration that she is entitled free from certain charges to the east half of lot number six in the first concession of the township of Innisfil.

This property formerly belonged to the late Alexander McLennan. By his will it was devised to his daughter, Isabella Jackson, subject to the following condition:—

“I further order and will my said daughter Isabella Jackson shall not sell or will or dispose of this hundred acre lot to any person or persons excepting to one or more of my children or grandchildren, to whom she may dispose of it if it is her wish to do so.”

Mrs. Jackson retained the ownership during her life, and attempts to make the following testamentary disposition of this property:—

She first charges upon it two legacies of \$1,000 each bequeathed to her husband and her adopted child, Winnifrid Blanche Campbell. She then directs that her husband may occupy the farm, rent free, for twelve months after her death. She charges her funeral and testamentary expenses and debts incurred for her medicines and medical attendance upon her estate generally; subject to these charges, she devises the property in question to her executor and executrix “upon trust and to the intent and purpose that my niece, Elizabeth Christina Rogerson (the plaintiff), shall be the beneficial owner thereof either as land or money, and that upon the said Elizabeth Christina Rogerson paying the moneys hereinbefore provided for in paragraphs two, three and four within fifteen months after my decease, the said lands shall be conveyed and assured to the said Elizabeth Christina Rogerson in fee simple, and that in case of the default of said Elizabeth Christina Rogerson failing to pay the said moneys within the time aforesaid, that then my said executor and executrix shall sell and absolutely convey away the said lands, and after paying and satisfying the said moneys

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provided to be paid as aforesaid, pay the residue of the proceeds of the said lands to said Elizabeth Christina Rogerson."

It was proved at the trial that several children and many grandchildren of Alexander McLennan still survive. Of the latter the plaintiff is one.

Upon conflicting evidence I found the value of the property to be \$2,900. The debts and funeral and testamentary expenses of Isabella Jackson, it was stated, amounted to \$500.

For the plaintiff it is contended that the condition against alienation in the will of Alexander McLennan is valid; that the charge of debts and legacies attempted to be made by Isabella Jackson is contrary to such condition; that such charges therefore fail; and that the devise to her is absolute.

For the defendant it is argued that the restraint imposed is invalid; that if valid, it does not prohibit such charges as the testatrix has attempted to make; that the plaintiff, claiming under the will of Mrs. Jackson, must take the property, if at all, with such burdens and upon such conditions as the testatrix has seen fit to attach to her gift; that, if the conditions annexed to the gift are not validly imposed, the gift itself, because conditional, fails and the testatrix is, as to this property, intestate; and finally that, if the conditions imposed by the testatrix are contrary to the restrictions upon her power of disposition, her will cannot be deemed to have been made with the intent of exercising such power, and therefore its dispositions in regard to this property are ineffectual.

Without expressing any opinion as to what would be the proper disposition of this case were I free to decide it upon such authorities as *In re Macleay*, L.R. 20 Eq. 186, and *In re Rosher*, *Rosher v. Rosher*, 26 Ch. D. 801, in the present state of the authorities in this Province, binding upon me, I must hold the condition in the will of Alexander McLennan to be valid. See *In re Northcote* (1889), 18 O.R. 107; *O'Sullivan v. Phelan*, 17 O.R. 730, 14 P.R. 278 n.; *Re Weller* (1888), 16 O.R. 318; *Re Winstanley*, 6 O.R. 315; *Smith v. Faught*, 45 U.C.R. 484; and *Earls v. McAlpine*, 27 Gr. 161, 6 A.R. 145.

Both *Re Watson and Woods* (1887), 14 O.R. 48, in which the devisee was required not to dispose in any way of the property devised, but "to keep it for his heirs," and *Hedde-*

ston v. Heddleston, 15 O.R. 280, in which all disposition by the devisees "except by will to their lawful heirs" was prohibited, are clearly distinguishable from a case in which disposition by any means to a comparatively large class, children and grandchildren, not of the devisee, but of the testator, is allowed.

Although the will of Mrs. Jackson does not purport to be made in pursuance of the power of disposition given her by Alexander McLennan, I think it reasonably clear that, in attempting to dispose of the property in question as she did by her will, she intended to exercise that power. She had no other real property. She specifically describes the lands. She must be presumed to have known that of this property she had no other right of disposition. It is improbable, therefore, that she was endeavouring to do that which she knew was beyond her power. Moreover, the terms of her will indicate to me that it was drawn with the purpose of making dispositions in form within the power given her, though contrary to its spirit. I therefore think this will should be held to have been made by Mrs. Jackson with the intent and for the purpose of exercising the power of disposition conferred upon her by her devisor: *Deedes v. Graham* (1869), 16 Grant 167, 170, 171; *Rooke v. Rooke* (1862), 2 Dr. & Sm. 38, 46.

The restraint being valid, the devisee taking subject to it may not defeat it by any indirect means. If she were permitted to charge the lands, as she has here done, in favour of persons not within the class of objects of the power of disposition which she has, the restraint might as well be non-existent. Here she in fact gives only \$400 out of \$2,900 to the beneficiary, who is a legitimate object of the power she attempted to exercise. I think it quite clear that the two legacies of \$1,000 each to the husband and adopted daughter fail, as does also the devise of twelve months' right of occupation in favour of the former.

In the absence of any representative of the creditors of Isabella Jackson, I refrain from expressing any opinion upon their possible rights as against this property.

What is the effect upon the plaintiff's rights? It is true that the testatrix was in no way bound to make the plaintiff an object of her bounty. She was not bound to exercise the

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power of disposition given her by the testator McLennan, or she might have exercised it by devising the property to some other or others of his children and grandchildren. But she has exercised it in favour of the plaintiff, and has in explicit terms expressed her intention that the plaintiff shall be the beneficial owner of the property — either lands or money — and has directed that upon her paying certain moneys the lands shall be conveyed to her. These provisions, in my opinion, amount to an appointment of the whole property to the plaintiff, upon conditions which the testatrix had not power to impose. She therefore takes the whole freed from the conditions: *Rooke v. Rooke*, 2 Dr. & Sm. 38; *In re Jeaffreson's Trusts* (1866), L.R. 2 Eq. 276; *McDonald v. McDonald* (1875), L.R. 2 H.L. (Sc.) 482; *Alexander v. Alexander* (1755), 2 Vesey Sr. 640; Sugden on Powers, 8th ed., pp. 689, 690. This is not a case in which part of the property subject to the power is validly appointed, and the rest invalidly—as in *Bell v. Lee* (1883), 8 A.R. 185, and *Deedes v. Graham*, 20 Gr. 258. The direction to convey the whole of the land to the devisee upon payment of the sums attempted to be charged upon it by the testatrix puts it in that class of cases, of which I have cited several, where there has been a valid appointment of the whole with invalid conditions annexed.

The plaintiff is entitled to judgment as prayed, and for her costs of this action to be paid by the defendant.

A. H. F. L.

END OF VOLUME X.

APPENDIX I.

[PRIVY COUNCIL.]

PEART V. THE GRAND TRUNK RAILWAY COMPANY.*

Railway—Negligence—Neglect of Statutory Warning—Collision at Crossing—Contributory Negligence—Nonsuit.

The deceased, who was well acquainted with the locality, while driving along a highway running in the same direction as and crossing a railway was killed at the crossing by a locomotive, running alone, coming from a direction behind him. The trial Judge left it to the jury to say whether there was negligence on the part of the defendants, and whether the deceased could with ordinary diligence have seen the engine in time to avoid the collision, and whether he was guilty of any want of ordinary care and diligence which contributed to the accident.

The jury found that the engine was going unusually fast; that the whistle was sounded at a crossing three-fifths of a mile off, but was not continued at the other crossings and that the deceased was not guilty of contributory negligence:—

Held, that the case had been properly left to the jury and that the verdict not being against the weight of evidence ought not to be disturbed.

AN appeal by the defendants from the judgment of the Court of Appeal for Ontario, reported 10 A.R. 191, was argued before the Judicial Committee of the Privy Council [The Lord Chancellor, Lord Blackburn and Sir Richard Couch], on 3rd March, 1886.

The facts are fully stated in the former report.

Shiress Will, Q.C., and *Cromwell White*, for the appellants.
Van Norman, Q.C., for the respondent, was not called on.

At the close of the argument for the appellants the judgment of their Lordships was delivered by the Lord Chancellor (Lord Herschell).

It is not necessary at all for their Lordships to express any opinion further than on the question whether the verdict was against the weight of evidence. Of course if there was no evidence at all there should be a nonsuit. Their Lordships will not attempt to define, when on a question of contributory neg-

* This judgment being frequently referred to and not having appeared in the English Law Reports it has been considered advisable to publish it.

ligence, it is within the province of the Judge to nonsuit, and they do not think it would be right to discuss it further; for if there was evidence here at all to go to the jury upon the important issues in the case, and that evidence was such as to make the verdict found for the plaintiff not against the weight of evidence, it follows of course that this was not a case in which the Judge should have taken upon himself to have directed a nonsuit.

The first question that is raised is, whether there was sufficient proof of negligence of the company in not giving the statutable signals, and whether the negligence in not doing that which was undoubtedly intended by the statute to be a duty cast upon the railway company for the purpose of protecting those who were using the crossing in question, was the occasion of the accident, in so far that the collision which took place when the deceased man was crossing arose from that. So far as that is concerned there does not seem to their Lordships to be any ground at all for an appeal. The evidence, in the opinion of their Lordships, was very strong that the signals were not given. There was no doubt evidence, and strong evidence, the other way, but that made a question for the jury; it was left to them, and the jury have found for the plaintiff. The Judge who summed up the case is satisfied, and of all the Judges in Canada who heard the appeal in the Court below, there is not one who differed on that point. As far as regards the question of whether or no there was proper evidence of the original negligence, no more need be said.

But then comes the question which has been the most argued and upon which there is one of the Judges, Chief Justice Cameron, who differed from the rest of the Judges in the Court below. The learned Judge who tried the case originally, when he had given his direction (and there seems to be no ground whatever for saying that it was wrong) proceeds to say this: "If you find that there was negligence on the part of the defendants, it does not follow that you find a verdict for the plaintiff. You have then to consider whether the plaintiff was guilty of contributory negligence, because if a man chooses to run into danger without taking proper precautions to protect himself, he is not entitled to recover. If a man, seeing the

train approaching, chooses to take the risk of crossing, no jury would be justified, or think themselves justified, in finding a verdict in his favour." Then he says: "Does the evidence amount to this?" and he leaves it to the jury.

Now there have been some comments and remarks made upon different parts of this direction to the effect of what the Judge did leave to the jury, but at the end it is made quite clear. At the end of the case, when the Judge has summed up to the jury in that way, Mr. Bethune says "that his Lordship should tell the jury the plaintiff is bound to prove the absence of signals." Then the Judge says to the jury, "Of course you understand that in all cases when the plaintiff comes into Court, the onus is upon him. He has to satisfy you that there was negligence on the part of the defendants, and he can only do that by satisfying you that the signals were not given." Then Mr. Bethune says that his Lordship "should have told the jury that the deceased knew he was going on the track, and it was his duty to look out for the approaching train. That all the evidence shews that if he had looked he could have seen it and so have avoided the accident. Should have told the jury, as a fact, to say whether he acted prudently in not looking out for the train." Upon that the Judge tells the jury this: "Whether a person driving in the position the plaintiff was should look"—that is to say, should prudently look—"in the direction, you have to decide in point of fact." That is answering and completely complying with what had been said to him. "You have to say whether under those circumstances the deceased was chargeable with want of ordinary care and prudence in not seeing the train." Then the jury ask a question as to what ordinary diligence was, and the Judge says: "Ordinary diligence is that care which an ordinary prudent man would observe under the same circumstances, having the knowledge this party had. Do you think, under the circumstances, here, the deceased was guilty of negligence? Would an ordinary prudent man, under the same circumstances, have looked and seen the train?" Then he asks two express questions, and they are the sixth and seventh. The sixth question is, "Could the deceased, if he had used ordinary diligence, have seen the engine in time to avoid the collision? (A.) No." Then the seventh is, "Was the deceased

in your opinion guilty of any want of ordinary care and diligence which contributed to the accident, if so, state in what respect. (A.) No."

Now the answer to those two questions is clear, and the question is, is there ground for saying that in this case there was no evidence upon which the jury could properly have so found; or rather is the evidence such, or so scanty, that the jury ought not to have so found, and that the verdict ought at least to be set aside on the ground that it was against the weight of evidence? Their Lordships cannot say that they think it is so. Their Lordships assume, of course, that the jury are quite correct in their verdict when they found that the whistle was sounded at Lossings Crossing, but was not sounded afterwards, and they assume it to be proved that when the whistle was sounded at Lossings Crossing the deceased man, Peart, was driving along in his buggy cart at a place very near to where the witnesses Taggart afterwards saw him: he might or might not, at that place, have heard the whistle sounded at Lossings Crossing. Whether he did hear it or not, cannot now be made perfectly clear, as the man is dead, and could not be asked. But he might have heard it. If he heard it, it does not necessarily follow that he would have concluded, hearing the whistle and nothing else, that there was a train coming along that line. He might have done so, but whether he did so or not it is impossible to tell. The jury might have found this either way.

As he drove along in that direction, as long as he had no reason to suppose that a train was coming from the west, he looking between his horse's ears, and seeing the way to get his horse forward, going towards the east, would not see anything behind him, and would not see the light. But if he heard the whistle at Lossings, or if heard behind him a rumbling such as to tell him an engine was coming along the line, then it might have been a natural and a reasonable thing for him to turn his head round to look and see, in which case he would probably have seen the light coming, and then he would have had warning so as to know that it was not safe to cross. But all these things are matters of evidence which have more or less weight. At the trial there does not seem to have been so much weight attached

to the fact that the engine would make the rumbling noise that has been urged so much before their Lordships. That apparently was not much relied upon; but if it had been so, still all this would have amounted to some evidence on which the jury might think that a prudent man, knowing what the deceased knew, in the deceased's circumstances, would have known there might be a train behind him, and would have looked before he went across.

Then on the other hand it is to be remembered that although the deceased knew perfectly well there was a crossing, and knew that some train might be coming along there, he also knew that if a train was coming, and if the duty of the company was performed there must have been from Lossings Crossing and those other crossings a continuous whistling which he could not fail to hear, and that might, as the learned Judge pointed out to the jury it was a fair thing for them to consider, deprive him of all suspicion that a train could be coming. He might think that he could safely drive over the crossing, for if there was a train coming behind from the west he must inevitably have heard the noise. Their Lordships do not say that the evidence was conclusive at all to shew that the deceased was not guilty of contributory negligence, but it shews that it was a fair and proper case for the jury to consider whether or not he was guilty of contributory negligence; and the jury have found that he was not, and the learned Judge who heard the case not being dissatisfied, and the great majority of the Judges in the Court of Appeal having thought the verdict was right, it certainly seems to their Lordships that it would not be right to reverse it. The consequence is that their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and the appellant will pay the costs.

APPENDIX II.

Cases reported in the Ontario Law Reports decided on appeal to the Judicial Committee of the Privy Council and to the Supreme Court of Canada reported since the publication of Volume 9, Ontario Law Reports.

BURLAND V. EARLE, 6 O.L.R. 327—Varied by the Judicial Committee of the Privy Council, [1905] A.C. 590.

CENTRAL ONTARIO RAILWAY V. TRUSTS AND GUARANTEE COMPANY, reported 6 O.L.R. 1, *sub nom.* THE TORONTO GENERAL TRUSTS CORPORATION V. THE CENTRAL ONTARIO RAILWAY—Affirmed by the Judicial Committee of the Privy Council, [1905] A.C. 576.

HEWSON V. THE ONTARIO POWER COMPANY, 8 O.L.R. 88—Affirmed 36 S.C.R. 596.

LANGLEY V. KAHNERT, 9 O.L.R. 164—Affirmed 36 S.C.R. 397.

McVITY V. TRENOUTH, 9 O.L.R. 105—Affirmed 36 S.C.R. 455.

WENTWORTH ELECTION, IN RE (Dominion) SEALEY V. SMITH, 9 O.L.R. 201—Affirmed 36 S.C.R. 497.

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ACCOUNTS.

See MASTER'S OFFICE.

AFFIDAVIT.

See MASTER'S OFFICE.

ALIEN LABOUR ACT.

1. *Consent to Prosecution*—60 & 61 Vict. ch. 11 (D.)—1 Edw. VII. ch. 13 (D.)—The written consent required by sub-sec. 3 of sec. 3 of the Alien Labour Act, 60 & 61 Vict. ch. 11 (D.) as amended by 1 Edw. VII. ch. 13 (D.) for the bringing of the proceedings for the recovery of a penalty for an offence against the Act must contain a general statement of the offence alleged to have been committed, the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged.

A consent "to a summary prosecution being maintained under the provisions of the Alien Labour Act against A. for violations of the above Act and amendments thereto," is not sufficient.

Conviction quashed. *Rex v. Breckenridge*, 459.

2. *Constitutional Law—Deportation of Aliens*—60 & 61 Vict. ch. 11, sec. 6 (D.)—*Ultra Vires.*]—Section 6 of 60 & 61 Vict. ch. 11 (D.) (amended by 1 Edw. VII. ch. 13, sec. 3), providing for the return of certain immigrants to the country whence they came, is beyond the powers of the Dominion Parliament, as necessarily involving the exercise of extra-territorial constraint; and detention of an immigrant for the illegal purpose of return is unwarranted. *Re Gilhula—Re Cain*, 469.

ALIENATION.

See WILL, 9.

ALIMONY.

See HUSBAND AND WIFE.

ALLOTMENT.

See COMPANY.

AMALGAMATION.

See COMPANY, 6.

APPEAL.

Divisional Court—Motion to Quash—Acceptance and Adoption of Judgment—Payment of Money as Directed.]—In an

action for an injunction against a municipal corporation to restrain a sale of lands to one C. and to compel it to sell and convey the lands to the plaintiff, on the ground that his was the highest tender therefor, both plaintiff and C. having paid deposits, the trial Judge held that the plaintiff was entitled to an injunction restraining the sale to C., but that the corporation could not be compelled to sell to him and both the deposits were directed to be returned.

The corporation, having returned the deposits, appealed to a Divisional Court and the plaintiff moved to quash the appeal on the ground that the corporation had accepted and acted on the judgment and that C. would not now carry out the purchase:—

Held, that the mere payment of money, as directed by a judgment, is not a bar to an appeal from that judgment by the party making such payment: and mere obedience to a judgment, not such as to signify conclusive acceptance of its terms, does not destroy the right of appeal: that here the repayments of the deposits involved nothing inconsistent with the relief which the corporation sought upon its pending appeal and in no wise signified a conclusive submission to the judgment appealed from

Held, also, that no change in attitude upon C.'s part at this stage of the case could debar his co-defendants from taking steps by appeal to relieve them-

selves from an onerous judgment which they alleged had been pronounced in error. *Phillips v. The Corporation of the City of Belleville*, 178.

See COURT OF APPEAL—PARLIAMENT, 2 — REVENUE — SESSIONS.

ARBITRATION AND AWARD.

Partnership—Nomination of Arbitrator to Adjust Accounts—Staying Action.]—A partnership agreement contained a provision by which the parties thereto nominated and appointed a named person "as sole and final arbitrator in case of the death of either of the partners before the expiration of the said contract to finally adjust and settle all matters between the survivor and the personal representatives of the deceased partner within such time and on such conditions as he may see fit:—"

Held, upon the application of the surviving partners in an action brought against them by the personal representatives of the deceased partner to have the accounts of the partnership wound up, that this clause applied, and the action was stayed and a reference to the arbitrator directed. *Royal Trust Company v. Milligan*, 456.

See WAY, 5.

ARREST.

Ca. Re.—Special Bail—Relief under Rule 1047—Waiver—

Discharge of Bail.]—The defendant was arrested under an order in the nature of a *ca. re.*, and was released from close custody upon giving special bail by the deposit of a sum of money with the sheriff:—

Held, that he had not thereby waived his right to be relieved under Con. Rule 1047; and, it appearing, upon the material filed upon a motion under that Rule, that the order for arrest should not have been made, an order was made for the return to him of the sum deposited. *Adams v. Sutherland.*—*Josh v. Sutherland*, 645.

ASSAULT.

See CONSTABLE.

ASSESSMENT AND TAXES.

Superannuated Official of Dominion—Income—Exemption of.] The annual income allowed under the Superannuation Act R.S.C. 1886, ch. 18, to an official of the Dominion who has been superannuated and is no longer in the active service of the Dominion, is not exempt from municipal taxation. *Leprohon v. Corporation of Ottawa* (1878) 2 A.R. 522, distinguished.

Judgment of the county court of Carleton reversed. *Bucke v. The Corporation of the City of London*, 628.

ATTACHMENT OF DEBTS.

Moneys of Union—Representative Action—Judgment for

Costs against Representatives—Effect of—Non-liability of Union—Garnishment.] In an action against a union, in which certain members of it had been by an order of Court authorized, besides representing themselves, to defend the action on behalf of and for the benefit of all other persons constituting the union, and were to be bound by the judgment and proceedings therein, certain costs were ordered by the Court of Appeal to "be paid by the respondents to the appellants," the respondents being the representative members:—

Held, that although all the members of the union might possibly be bound by the judgment to be ultimately pronounced, an order that the defendants, respondents, should pay money whether for damages or costs, without more, could not be enforced by execution or process against the property of the union or members thereof not named as defendants, and that moneys in a bank to the credit of the union and three of its officers could not be garnished.

Judgment of Anglin, J., reversed. *Metallic Roofing Company of Canada v. Local Union, No. 30, Amalgamated Sheet Metal Workers' International Association et al*, 108.

See HUSBAND AND WIFE, 2—INSURANCE, 3.

AUCTION.

See COLLATERAL SECURITY.

AUDIT ACT.

See **BILLS OF EXCHANGE.**

BAIL.

See **ARREST.**

BAILMENT.

See **COMPANY, 2.**

BANKS.

See **BILLS OF EXCHANGE—
COLLATERAL SECURITY.**

BAWDY HOUSE.

See **CRIMINAL LAW, 2.**

BENEFICIARIES.

See **INSURANCE.**

BILLS OF EXCHANGE.

1. *Forged Cheques—Crown—Forgeries by Clerk in Government Department—Payment by Bank—Negligence—Pass Book—Duty of Customer to Check Accounts—Settlement of Accounts—Audit Act—Estoppel—Laches—Deposit of Cheques in other Banks—Liability over—Duty of Knowing Customer's Signature—Alteration in Position—Mistake—Liability as between two Innocent Parties.*]
—A clerk in one of the departments of the Dominion government forged several cheques upon the bank account kept by the department with the defend-

ants, in the manner set out in the judgment, and deposited the forged cheques to his own credit with other banks (third parties). The cheques went through the clearing house, and were paid by the defendants. The forgeries were not discovered for some months; the clerk who executed them was the person intrusted with the duty of checking the bank account and examining the pass-book.

In an action on behalf of the Crown to recover the amount of the forged cheques, which had been charged by the defendants against the department's account, the defendant's contended that the right to recover was barred by the omission or neglect by officers of the government of duties which the ordinary customer owes to his bank:—

Held, upon the evidence, that there was no negligence or carelessness on the part of the Crown officers in the circumstances preceding the forgeries which conduced to their commission.

2. That there is no contractual obligation on the part of the banker's customer to examine his pass-book; nor in this case was the passing of the book to and fro evidence of a stated and settled account, for the account was "a letter of credit" account, and the settlements between the Crown and the defendants were made by means of reimbursement cheques, pursuant to sec. 30 of the Audit Act, and the reimbursement cheques accepted by the defendants did not cover the forgeries.

3. But, if there was a breach of duty or negligence or omission, it would not avail the defendants, for the Crown is not bound by estoppel, nor responsible for the negligence or laches of its servants.

4. The claim of the defendants against the other banks with which the forged cheques were deposited was based upon liability as indorsers, or upon warranty or representation that the cheques were genuine, or upon payment and receipt of the proceeds of the forgeries under mistake of fact:—

Held, upon the evidence, that the third party banks were not indorsers, and that there was no implication of warranty or representation upon which a claim for indemnity could be founded.

5. The rules as to notice established in regard to genuine bills and notes are inapplicable to the case of mere forgeries.

6. The defendants never were acceptors of any of the cheques within the meaning of sec. 54 of the Canadian Bills of Exchange Act.

7. A banker does not owe to the holder of a cheque the duty of knowing his customer's signature.

Imperial Bank of Canada v. Bank of Hamilton, [1903] A.C. 49, applied and followed.

8. But upon the ground of estoppel arising from payment by the defendants of the forged

cheques and the change in position of the third parties which ensued, the defendants were not entitled to recover against the third parties.

9. And, apart from the estoppel, the rule that when one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it, afforded the third parties a defence; for, though they had credited the forger's accounts with the amounts of the forged cheques before they were presented for payment, that mistake would have been innocuous to them, had it not been for the subsequent mistake of the defendants in honouring those cheques; and this act of the defendants was the proximate cause which enabled the forger to reap the benefit of his frauds. *Rex v. Bank of Montreal*, 117.

2. *Mining Company—Subscription for Stock—Renewal of Note Given therefor—Total Failure of Consideration—Non-liability on Note—Right to Recover back Money Paid.*]
—On the strength of an agreement for the formation of a mining company, setting out its objects and purposes, including the proposed transfer to it by the plaintiff of two mining locations, the defendant subscribed for 60,000 shares of stock in the plaintiff company at 10c. per share, giving two promissory notes therefor of \$3,000 each to the plaintiff company, one of which he duly

paid, and the other, after being twice renewed, remained unpaid. The objects and purposes of the company, through no fault of the defendant, were never carried out, and became utterly impracticable; no transfer of the mining locations was ever made, and all expectations of ever successfully carrying out the agreement were abandoned:—

Held, that there was a total failure of consideration, and not only was the defendant not liable on the unpaid note—the fact of its renewal in no way affecting his position—but that he was entitled to recover back the amount he had paid on the other note. *The Bullion Mining Co. v. Cartwright*, 438.

3. *Endorsement by Third Party without Endorsement by Payee—High Court of Justice—Following Precedents.*—The defendant became the endorser of two promissory notes without the payees having endorsed same, being so endorsed by the defendant in pursuance of an agreement with the payees for valuable consideration that he should endorse them and become liable thereon:—

Held, that the defendant was liable.

Robinson v. Mann (1901), 31 S.C.R. 484 followed.

Steele v. McKinlay (1880), 5 App. Cas. 754, and *Jenkins v. Coomber*, [1898] 2 Q.B. 168, not followed.

It is the duty of the Courts of the Province to follow the decision of the highest Court in

Canada, being the latest decision on the subject, without questioning whether or not it is in accordance with previous cases. *Slater v. Laboree*, 648.

See CONTRACT.

BONDS.

See COLLATERAL SECURITY RAILWAY, 1.

BREWERIES.

See MUNICIPAL CORPORATIONS, 3.

BROKER.

Purchase of Shares on Margin—Hypothecation by Brokers—Conversion—Bought Note—Account.—Where a broker is carrying stock on margin for a principal, it is not a conversion for him to hypothecate it to his bankers to secure his general indebtedness, provided he has at all times after the purchase a quantity of the stock equal to the amount purchased to deliver to the principal on demand and payment of the balance due.

Per ANGLIN, J.:—In this case such a hypothecation was a conversion, as it did not appear that the broker had the stock to answer such demand except by either obtaining the release of the hypothecated stock (as to which no special right was proved to have been reserved) or by purchasing other shares on the market. In taking

an account the principal was entitled to credit for the market value of the stock on the day of such conversion.

Per ANGLIN, J., also:—A memorandum on a bought note that the broker reserves the right of pledging the shares, or raising money on them in any way convenient, when properly construed, only asserts the right to pledge the shares for the amount which the principal owes upon them. *A. E. Ames & Company v. Conmee*, 159.

See CRIMINAL LAW, 4.

BURIAL GROUND.

See CEMETERY.

BY-LAWS.

See MUNICIPAL CORPORATIONS.

CABS.

See MUNICIPAL CORPORATIONS, 2.

CASES.

Abouloff v. Oppenheimer, 10 Q.B.D. 295, followed.]—*See* JUDGMENT.

Armstrong v. Canada Atlantic R.W. Co., 4 O.L.R. 560, referred to.]—*See* WAY, 3.

Attorney General of Canada v. Corporation of Toronto, 23 S.C.R. 514, followed.]—*See* MUNICIPAL CORPORATIONS, 3.

Badgerow v. Grand Trunk R.W. Co., 13 P.R. 132, applied and followed.]—*See* EVIDENCE, 2.

Blight v. Ray, 25 O.R. 415, considered.]—*See* MECHANICS' LIEN.

Bristol, Cardiff and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. 616, followed.]—*See* VENDOR AND PURCHASER, 1.

Brown v. Dalby, 7 U.C.R. 160, discussed.]—*See* SEDUCTION.

Central Press Association v. American Press Association, 13 P.R. 353, applied and followed.]—*See* EVIDENCE, 2.

Chandler and Massey, Limited v. Grand Trunk R.W. Co., 5 O.L.R. 589, followed.]—*See* PARTIES.

City of Kingston v. Kingston, etc., Electric Railway Co., 25 A.R. 462, distinguished.]—*See* STREET RAILWAYS, 2.

Clough v. London and North Western R.W. Co., L.R. 7 Ex. 26, followed.]—*See* RELEASE.

Gearing v. Robinson, 25 A.R. 364, considered.]—*See* MECHANICS' LIEN.

Graham v. Williams, 8 O.R. 478, considered.]—*See* MECHANICS' LIEN.

Henderson v. Canada Atlantic R.W. Co., 25 A.R. 437, followed.]—*See* DAMAGES, 2.

Hewson v. Macdonald, 32 C.P. 407, distinguished.]—*See* RELEASE.

Hilton v. Guyot, 159 U.S. 113, not followed.]—See JUDGMENT.

Hinds v. Town of Barrie, 6 O.L.R. 656, followed.]—See PARTIES.

Holland, Re, 3 O.L.R. 406, approved.]—See WILL, 8.

Hume, In re, Forbes v. Hume, [1895] 1 Ch. 422, considered.]—See WILL, 4.

Hussey v. Horne-Payne, 4 App. Cas. 311, followed.]—See VENDOR AND PURCHASER, 1.

Imperial Bank of Canada v. Bank of Hamilton, [1903] A.C. 49, applied and followed.]—See BILLS OF EXCHANGE.

Jenkins v. Coomber, [1898] 2 Q.B. 168, not followed.]—See BILLS OF EXCHANGE, 3.

Justices of York and Peel, In re, Ex parte Mason, 13 C.P. 15, followed.]—See SESSIONS.

Kelly v. Barton, 26 O.R., 608 22 A.R. 522, followed.]—See CONSTABLE.

Kennedy v. Protestant Orphans' Home, 25 O.R. 235, approved.]—See WILL, 8.

Kinny, Re, 6 O.L.R. 459, followed.]—See WILL, 4.

Langley v. Law Society of Upper Canada, 3 O.L.R. 245, distinguished.]—See PARTIES.

Learoyd v. Halifax Joint Stock Banking Co., [1895], 1 Ch. 686, followed.]—See EVIDENCE.

Leprohon v. City of Ottawa, 2 A.R. 522, distinguished.]—See ASSESSMENT AND TAXES.

Lovell v. Lovell, 5 O.W.R. 401, 640, followed.]—See HUSBAND AND WIFE.

Manning v. Robinson, 29 O.R. 483, approved.]—See WILL, 8.

Maritime Bank v. Troop, 16 S.C.R. 456, followed.]—See COMPANY, 3.

Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 243, applied.]—See WAY, 4.

Moreland v. Richardson, 22 Beav. 596, 24 Beav. 33, followed.]—See CEMETERY.

Morrow v. Canadian Pacific R. W. Co., 21 A.R. 149, followed.]—See NEGLIGENCE, 2.

Nelson Coke and Gas Co. v. Pellatt, 4 O.L.R. 481, followed.]—See COMPANY, 7.

Partlo v. Todd, 17 S.C.R. 196, applied.]—See TRADEMARK.

Pearson v. Carpenter, 35 S.C.R. 380, followed.]—See CRIMINAL LAW, 4.

Provident Chemical Works v. Chemical Manufacturing Co., 4 O.L.R. 546, applied.]—See TRADEMARK.

Read v. Friendly Society of Operative Stonemasons, [1902] 2 K.B. 732, applied.]—See MASTER AND SERVANT, 2.

Regina v. McIntosh, 28 O.R. 603, followed.]—See SESSIONS.

Rex v. Geiser, 21 C.L.T. Occ. N. 604, distinguished.]—See SESSIONS.

Rex v. Neuberger, 2 B.C.R. 272, distinguished.]—See SESSIONS.

Rice v. Town of Whitby, 25 A.R. 191, followed.]—See PARTIES.

Robinson v. Mann, 31 S.C.R. 484, followed.]—See BILLS OF EXCHANGE, 3.

Ryland, In re, [1903] 1 Ch. 467, followed.]—See WILL, 4.

Sidebottom, In re, [1902], 2 Ch. 389, followed.]—See WILL, 4.

Simpson v. Eggington, 10 Ex. 845, followed.]—See MORTGAGE, 2.

Snider v. Snider, 11 P.R. 140, distinguished.]—See HUSBAND AND WIFE.

South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A.C. 239, applied.]—See MASTER AND SERVANT, 2.

Steele v. McKinlay, 5 App. Cas. 754, not followed.]—See BILLS OF EXCHANGE, 3.

Tate v. Natural Gas and Oil Co., 18 P.R. 82, distinguished.]—See PARTIES.

Vadala v. Lawes, 25 Q.B.D. 310, followed.]—See JUDGMENT.

Vallee v. Grand Trunk R. W. Co., 1 O.L.R. 224, followed.]—See NEGLIGENCE, 2.

Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, followed.]—See DAMAGES, 2.

Vincent v. Sprague, 3 U.C.R. 283, discussed.]—See SEDUCTION.

Wallis v. Littell, 11 C.B.N.S. 369, applied and followed.]—See COMPANY, 4.

Watt v. Watt, [1905] A.C. 115, followed.]—See DAMAGES, 1.

Weekes v. Frawley, 23 O.R. 235, approved and applied.]—See INSURANCE, 3.

Williams v. Kershaw, 11 Cl. & F. 111 (n.), 5 L.J. Ch. 86, 42 R.R. 269, not followed.]—See WILL, 7.

Wilson and Town of Ingersoll, 25 O.R. 439, commented on.]—See MUNICIPAL CORPORATIONS, 7.

Woodruff v. McLennan, 14 A.R. 242, not followed.]—See JUDGMENT.

CEMETERY.

Family Burial Ground—Land-locked Plot—Reservation in Deed—Interference with Graves—Right of Descendants to Restrain—Abandonment—Possessory Title—Access to Plot—Way of Necessity.]—Persons having an estate or interest in a plot of ground set apart and used as a family burying ground, in which the bodies of ancestors and relatives are interred, may maintain an action to restrain destruction of, injury to, or interference with the graves or the gravestones or monuments upon or over them.

Moreland v. Richardson (1856), 22 Beav. 596, and (1858), 24 Beav. 33, followed.

Part of a farm was set apart as a family burial plot in or about the year 1827, and in 1838 a parcel of the farm was conveyed to the defendant's predecessor in title, "save and except about one quarter of an acre of said lands used as a burying ground." In 1890 one of the family erected on the plot, or what he supposed to be the plot, a monument to two of his ancestors, and surrounded the supposed plot with a hedge:—

Held, upon the evidence, affirming the judgment of Teetzel, J., that there was a burying ground in respect of which the reservation was made in the deed of 1838; that there was not an abandonment; that the hedge planted in 1890 enclosed a portion at any rate of the original plot; that neither the defendant nor any of his predecessors in title had acquired a possessory or other title to the plot; and that the plaintiffs had shewn a sufficient interest in or title to the plot to enable them to maintain the action.

The plot being a land-locked piece of ground, reserved out of a grant of the surrounding property, there was an implied way of necessity to and from it, limited to the purposes for which the plot was expressed to be reserved. *May et al v. Belson*, 686.

CERTIFICATE.

See COMPANY, 2—PARTNERSHIP.

CERTIFICATE OF LIS PENDENS.

See VENDOR AND PURCHASER, 2.

CHANGE OF REFERENCE.

See SOLICITOR, 1.

CHARITABLE USES.

See WILL, 4.

CHEQUES.

See BILLS OF EXCHANGE.

COLLATERAL SECURITY.

Pledge — Railway Bonds—Bank—Power of Sale—Construction — Notice — Abortive Auction Sale—Subsequent Private Sale.—As collateral security to a promissory note, the makers deposited with a bank 300 railway bonds, and by a memorandum of hypothecation, authorized the bank, upon default, "from time to time to sell the said securities . . . by giving 15 days' notice in one daily paper published in the city of Ottawa . . . with power to the bank to buy in and resell without being liable for any loss occasioned thereby:—"

Held, reversing the judgment of STREET, J., 7 O.L.R. 660, OSLER, J.A., dissenting, that the

power was to sell by auction, and that the bank had no power to sell by private contract.

Semble, that, even if there was power to sell by private contract, the sale made to the respondents could not, upon the evidence as to the methods adopted, be supported, they having notice that the bank held the bonds as pledgees. *Toronto General Trusts Corporation v. Central Ontario R. W. Co.*, 347.

COMPANY.

1. *Transfer of Shares—Fully Paid up Shares—Refusal to Transfer—R.S.O. 1897, ch. 191, sec. 47.*]—Section 47 of the Ontario Companies Act, R.S.O. 1897, ch. 191, empowers directors to make by-laws to regulate the transfer of stock, that is to declare how and in what manner and with what formalities it is to be transferred, but the Act nowhere authorizes a company to refuse to transfer on their books fully paid up shares. *In re Imperial Starch Company*, 22.

2. *Shares—Deposit of Certificates—Bailment—Trust—Detention—Trustee Act—Winding-up—Direction of Master—Jurisdiction—Detinue—Measure of Damages—Price of Shares.*]—The E. Company became the holders of 525 shares in the capital stock of a coal company and of 50 shares in a steel company, depositing the certificates thereof,—which were put in the

name of the defendants, a trust company—with them for safe keeping, receiving from the trust company a document under seal whereby they acknowledged the receipt of the certificates, and agreed to hold same in their safe deposit vaults to the order of the loan company, with any dividends received in respect thereof, guaranteeing they would be kept safely therein, and delivered up on demand to the E. Company, the remuneration of the trust company also being provided for. 375 of the shares had been acquired by the E. Company under an agreement with another company, the A. Loan Company, who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in the defendants' possession both loan companies were ordered to be wound up under the Dominion Act, the defendants being appointed liquidators of the A. Company, and the L. and W. Trust Company liquidators of the E. Company. After the commencement of the liquidation proceedings the L. and W. Company, as such liquidators, demanded the certificates from the defendants, and, on the latter refusing to deliver them up, this action was brought for damages for the detention:—

Held, that the defendants were merely bailees, and not trustees, but, even if regarded as trustees, the failure to hand over the certificates was not a breach of trust, for which they were fairly excusable under 62

Vict. (2) ch. 15, sec. 1 (O.); for owing to their dual character of trustee of the E. Company and liquidators of the A. Company, they did not act with singleness of purpose; and that a direction made by the Master in Ordinary, to whom was referred the winding up of the A. Loan Company, that the whole 575 shares should be retained by the defendants as such liquidators, was made without jurisdiction and so afforded no protection, and that damages for the detention (delivery having been made pending the action) should be based on an estimate of what had been lost by the detention, the measure thereof being the highest price which could have been procured for the shares between the demand and the delivery.

Judgment of Boyd, C., 7 O.L.R. 1, affirmed, MacLennan, J. A., dissenting. *The Elgin Loan and Savings Co. et al. v. The National Trusts Co., Limited*, 41.

3. *Winding-up—Stock Issued as “Fully Paid-up,”—Part Payment—Liability—Contributory—Set-off by Shareholder—Mutuality—R.S.O. 1897, ch. 191, sec. 37.*—A certificate of 238 shares of stock was issued to one McN. described as fully paid up, pursuant to an understanding between him and the directors. He paid for 171 shares, and accepted the certificate knowing that 67 shares were not paid for, but believing that there was no further liability in respect to them. There

was no evidence of any application for them by him or of any allotment to him. He transferred one share, surrendered his certificate, and got a new one for 237 shares, and acted as a director of the company. His name was in the stock ledger and stock register as a holder of 237 shares:—

Held, that he was a shareholder with all the rights and liabilities of a shareholder, and that he was properly put upon the list of contributories for the amount actually unpaid in respect of the shares.

McN. had paid \$1,500 on a guarantee given for the company, and claimed to set off that amount against his liability on the shares.

Held, that sec. 37 of R.S.O. 1897, ch. 191, has reference only to an action against a shareholder in the nature of a *sci. fa.* by a creditor of the company, and that its provisions do not extend the right of set-off to proceedings against shareholders under that Act, and that such right did not exist on the broad ground of absence of mutuality between the claim of the liquidator against McN. and the latter's claim as a creditor against the company.

The Maritime Bank v. Troop (1889), 16 S.C.R. 456, followed, and the judgment of King, J., in the court below referred to with approval. *Re Wiarton Beet Sugar Manufacturing Co.—Alexander McNeill's Case*, 219.

4. *Subscription for Shares—Conditional Subscription—Condition not Fulfilled—Representations of Agent—Materiality—Evidence—Corroboration—Written Contract—Contemporaneous Oral Contract.*]—In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiffs' agent that two other named persons had each subscribed \$10,000 of shares upon the condition that subscriptions for \$50,000 were obtained by a certain date; that the defendant's subscription was required to make up the \$50,000; and that his subscription would not be binding unless the \$50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for \$10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that \$50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiffs' agent having died some years before the commencement of the action; and the trial Judge credited the testimony:—

Held, that it was sufficient without direct corroboration, and, in the absence of facts or circumstances of countervailing weight, should be accepted.

Held, also, that the plaintiffs were bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not.

Held, lastly, that where contemporaneously with a written agreement there is an oral agreement that the written agreement is not to take effect until some other event happens, oral evidence is admissible to prove the contemporaneous agreement.

Wallis v. Littell (1861), 11 C.B.N.S. 369, applied and followed. *Ontario Ladies' College v. Kendry*, 324.

5. *Winding up—Contributory—Allotment—R.S.O. 1897, ch. 191, sec. 26.*]—A subscriber for a share in a company was debited in the company's stock ledger with one share, was placed on the "shareholders' list," and was drawn upon for the first payment of ten per cent. and paid the draft. There was no formal allotment to him:—

Held, that what had been done must be taken to have been done by authority of the directors and to be a mode of allotment "ordained" by them within the meaning of the Companies Act, R.S.O. 1897, ch. 191, sec. 26. *Hill's Case*, 501.

6. *Amalgamation—Restraint Against Selling Out—Agreement—Forfeiture—Laches—*

Waiver—Notice.—In 1889 the city of Toronto entered into similar agreements with the defendant companies, by which they authorized these companies to lay down and operate underground wires and appliances for the distribution and supply of electricity, and gave them other privileges in connection with their business. By these agreements the defendants were forbidden to lease to, amalgamate with or sell out to any other company, without the consent of the plaintiffs; and if they did so, all rights granted thereby were to cease and determine. In 1896 the Incandescent Co. sold out all their assets and the shareholders transferred their shares to the Electric Light Co.:—

Held, that the Toronto Electric Light Co. had not in purchasing fallen within the prohibition clause, for to hold to the contrary would be to add the word "buy" to that clause.

Held, also, that what had been done was not an amalgamation of the two companies inasmuch as the purchase was for cash and for cash only, and the Incandescent Light Co. acquired no interest whatever in the assets and affairs or otherwise of the other company.

Held, further, that inasmuch as the actions were not commenced till April, 1902, the plaintiffs had by their long delay in bringing suit and also by their conduct after the alleged breach and before the action

lost their right to complain. The plaintiffs had by their conduct waived the alleged forfeiture, the evidence clearly shewing that they had knowledge throughout of the facts upon which the right to claim a forfeiture rested, and it was not necessary to prove actual notice.

Held, lastly, that notice to the city engineer was in the circumstances of this case sufficient although the evidence shewed much more than that, and warranted the conclusion that knowledge of the absorption of the one company by the other was common and general throughout the city and might safely be imputed to the city council as a whole especially as no civic official had denied such an inference. *City of Toronto v. Toronto Electric Light Co.*—*City of Toronto v. Incandescent Light Co. of Toronto, and the Toronto Electric Light Co.*, 621.

7. *Winding up—Contributory—Subscription for Shares—Contract under Seal—Offer—Acceptance—Allotment—Notice.*—The respondent by a writing under seal dated the 29th July, 1903, subscribed for one share in the capital stock of the company, and agreed to pay \$100 for it, 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months thereafter, and the balance as the directors might deem advisable. It was arranged that the company should draw upon the respondent for the amount payable on application. On

the next day, and before anything had been done by the company, the respondent wrote to the company, cancelling his subscription. The company drew on the respondent for the 10 per cent., but he refused to accept the draft, and being pressed by the company by letter of the 16th September, 1903, to accept the draft, again declined to do so. On the 8th September, 1903, a resolution was passed by the directors "that the stock now subscribed be allotted and notice sent to each subscriber that we are drawing on them for their second payment." The company did not draw on the respondent for the second payment, and he was not notified of the allotment, but his name was recorded in the book required by sec. 71 of the Ontario Companies Act to be kept by the company, as a shareholder holding one share. He was not afterwards in any way treated or dealt with as a shareholder. In a proceeding for the winding-up of the company, it was sought to make him liable as a contributory:—

Held, following *Nelson Coke and Gas Co. v. Pellatt* (1902), 4 O.L.R. 481, that the instrument signed by the respondent was not a mere offer which he could withdraw before acceptance; but that the company never accepted or intended to accept him as a shareholder unless the down payment of 10 per cent. was made, and, after the refusal to make that

payment, they made it evident that they had not accepted him; and, even if they had accepted him, it was not shewn that the acceptance was communicated to him; and he was not, therefore, liable as a contributory. *Re Provincial Grocers Limited. Calderwood's Case*, 705.

See BILLS OF EXCHANGE, 2—
DEFAMATION—EVIDENCE, 2.

CONSENT.

See ALIEN LABOUR ACT, 1—
DAMAGES, 1.

CONSIDERATION.

See BILLS OF EXCHANGE, 2.

CONSTABLE.

Assault—Trespass—Unofficial Act—Absence of Malice—R.S.O. 1897, ch. 88.—*Held*, reversing the decision of a Divisional Court, 8 O.L.R. 251, that the defendant, a police constable, who assaulted the plaintiff, if he intended to act, as possibly he did, in his office of constable, did so voluntarily and without authority, or any reason to think that he had, officially, authority to do what he did, and was therefore, although the plaintiff did not prove malice, not entitled to the protection afforded by sec. 1, of sub-sec. 1, of R.S.O. 1897, ch. 88, and was liable for the trespass.

Kelly v. Barton (1895), 26 O.R. 608, 22 A.R. 522, followed.

Review of English and Ontario cases. *Moriarity v. Harris*, 610.

CONSTITUTIONAL LAW.

See ALIEN LABOUR ACT, 2.

CONTEMPT OF COURT.

Disobedience of Subpœna—Service—Necessity for Shewing Original.]—To bring a person into contempt for disobedience of a subpœna, it must be proved that the original writ was shewn at the time of service, as well as that a copy was delivered to and left with the person. *Woods v. Fader et al*, 643.

CONTRACT.

Illegality—Non-recovery Back of Money Paid and Cancellation of Notes—Impounding of Notes.]—The Court will not intervene, at the instance of a party to an illegal contract, to enable him to obtain relief from the exigencies thereof.

W. having been threatened with a criminal prosecution for having sexual intercourse with a young girl under sixteen years of age, effected a settlement whereby cash payments were made and promissory notes given by him. On his death, he having in no way repudiated the settlement during his life-

time, his administrator brought an action for the recovery of the money paid and the cancellation of the notes:—

Held, that the action was not maintainable, but the notes having been filed in Court it was ordered that they being illegal and void on the ground of public policy should remain on the files until further order. *Wood v. Adams*, 631.

See INSURANCE—MASTER AND SERVANT, 2—MUNICIPAL CORPORATIONS, 9—TIMBER—VENDOR AND PURCHASER, 1.

CONTRIBUTORY.

See COMPANY.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CONVICTION.

See COURT OF APPEAL, 2.

CORROBORATION.

See COMPANY, 4.

CORRUPT PRACTICES.

See PARLIAMENT, 1, 3.

COSTS.

Taxation—Witness Fees—Plaintiff Travelling from Abroad—Expenses—Subsistence Money—Plaintiff Re-

maining after Trial.—Upon a taxation between party and party of the plaintiff's costs and disbursements, she was allowed travelling expenses in coming from England to Ontario to give evidence on her own behalf at the trial of the action and in returning to England, and a *per diem* allowance for the time necessarily occupied in doing so, but was not allowed "subsistence money" for a period after the trial during which she remained in Ontario awaiting the result of an application for a new trial in order to be in readiness to testify if one should have been directed. *Tattersall v. People's Life Insurance Co.*, 537.

See DISTRESS—PARLIAMENT, 2
—SESSIONS—WAY, 5.

COUNTERCLAIM.

See DISTRESS.

COURT OF APPEAL.

1. *Leave to Appeal from Judgment at Trial.*—It is to the interest of all parties that the series of possible appeals should be reduced by one in cases of substantial importance.

Leave to appeal direct from the judgment at the trial to the Court of Appeal granted, in the circumstances of this case. *Molsons Bank v. Stearns*, 95.

2. *Right to Appeal to—Order of Divisional Court on Appeal from Conviction—Loan Corporations Act—Judicature*

Act—Amending Act, 4 Edw. VII, ch. 11.—There is no right of appeal to the Court of Appeal from a judgment or order of a Divisional Court made upon an appeal to that Court under sec. 117 (4) of the Loan Corporations Act, R.S.O. 1897, ch. 205, from a magistrate's conviction.

Construction of secs. 50 and 75 of the Judicature Act, as enacted by sec. 2 of the amending Act 4 Edw. VII. ch. 11.

Leave to appeal from the decision in 9 O.L.R. 374 refused, OSLER, J.A., dissenting. *Rex v. Pierce et al.*, 297.

3. *Appeal from Order for New Trial—Security on Appeal—Stay of Trial—Rule 827—Removal of Stay.*—A new trial having been ordered by a Divisional Court, the plaintiff gave notice of trial, but the defendants appealed to the Court of Appeal from the order directing the new trial, and gave the security required by Con. Rule 826, which was duly allowed:—

Held, that the order for a new trial was "a judgment or order appealed from," within the meaning of Con. Rule 827 (1) and, the security for the appeal having been allowed, the execution thereof, by proceeding to a new trial or otherwise, was stayed pending the appeal, by force of that Rule, such judgment or order not being one of the excepted cases mentioned in the Rule. The Rule is not confined to the case of a judgment

or order directing the payment of money, but extends generally to all appealable judgments or orders which are to be "executed" by proceedings to be taken thereunder or in consequence thereof.

In a proper case the stay may be removed and permission given to proceed to trial notwithstanding the appeal; but as a general rule such permission ought not to be granted; and in this case it was refused. *Uylaki v. Dawson et al.*, 683.

CRIMINAL CODE.

See CRIMINAL LAW.

CRIMINAL CONVERSATION.

See EXECUTORS AND ADMINISTRATORS.

CRIMINAL LAW.

1. *Criminal Code, secs. 191, 192—Common Nuisance, Indictment for—Negligent Operation of Street Cars—Running Reversely—Absence of Fenders and Headlights—Accident.*—An indictment alleged that defendants, a street railway company, were authorized to operate a street railway on certain streets in a city, and, in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, which, it was averred the said company, without reasonable excuse, neglected to do,

whereby the lives and safety of the public were endangered and a common nuisance thereby committed. In support of the indictment, it was shewn that near the northerly end of a double tracked street, and, at the intersection with a street at right angles thereto, there was what was called a "Y," whereby cars were turned on to the intersecting street and then switched on to a single track, which was usually the down track of the line of railway, the cars being backed up for about a half a mile, the rear part of the car thus for the time being the front thereof. While being so backed up, a woman in attempting to cross the street and not seeing or knowing of the approach of the car, it being dark at the time, was knocked down and killed. There was no fender or headlight on this end of the car, although provided on the usual front thereof, nor was any gong sounded or signal given of the car's approach:—

Held, that the indictment sufficiently charged a common nuisance both at common law and under secs. 191 and 192 of the Criminal Code; and that a conviction of the defendants was properly sustainable on the evidence. *The King v. The Toronto Railway Company*, 26.

2. *"Common Bawdy House"—Woman Living Alone—Criminal Code, sec. 195.*—Section 195 of the Criminal Code, 55-56 Vict. ch. 29 (D.),

has not changed the law as to what constitutes the offence of keeping a common bawdy-house; and a woman living by herself in a house is not within its scope, unless other women than herself resort to the house for purposes of prostitution. *Rex v. Mannix*, 303.

3. *Perjury—Evidence of Proceeding in which Offence Committed—Indictment and Trial—Production of Record—Certificate under Criminal Code, sec. 691—Conviction—Substantial Wrong or Miscarriage—Criminal Code, sec. 746 (f).*].—Upon a trial for perjury alleged to have been committed at a previous trial for a criminal offence, the fact of the previous trial must be proved by the production of the indictment and the formal record, or of a certificate under sec. 691 of the Criminal Code; the evidence of the clerk of the court, accompanied by the production of his minutes of the trial, and the evidence of the court stenographer who took down the evidence at the trial, are not proof of the indictment and trial.

Where there is no proper evidence of some fact essential to the proof of the crime charged and a conviction takes place, there is a substantial wrong or miscarriage at the trial, and sec. 746 (f) of the Code cannot be applied to uphold it.

Conviction by the chairman of the general sessions of the peace for the county of Brant

set aside, and a new trial ordered.—*Rex v. Drummond*, 546.

4. *Unlawfully Making Contracts for Sale of Stock—Keeping Common Gaming House—Stock Transactions on Margin—Agent for Broker—Evidence—Onus—Criminal Code—Aiding and Abetting—Evidence—Improper Reception—No Substantial Wrong or Miscarriage.*].—The defendant was convicted of unlawfully making contracts purporting to be for the sale of stock, goods, wares, or merchandise, in respect of which no delivery thereof was made or received, without the *bond fide* intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stock, goods, etc., contrary to sec. 201 of the Criminal Code, and of being the keeper of and keeping a common gaminghouse, contrary to that section.

The defendant carried on a business in a town in Ontario as "Harkness & Co., Brokers, Stocks, Grain, and Provisions." He was not a member of a stock exchange, but asserted that he was the agent of a firm of operators in Pennsylvania, with a branch in Buffalo, N.Y. When giving their orders, the persons who dealt with the defendant deposited with him sums of money not exceeding a margin of 2 per cent. in the case of stocks and 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was tele-

graphed to that office, and the next day the defendant handed to the customer a paper, signed Harkness and Co., brokers, notifying the customer that he had bought the commodities specified from their principals, at the price named, for delivery on demand, subject to the contract, etc. Save this document, there was no delivery. If the stocks, grain, or provisions held by the customer went up in price, he directed the defendant to sell out, and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. The defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day. No interest was charged :—

Held, that the proper inference from all the facts shewn was that there was an understanding between the defendant and the customers that the stocks, grain, or provisions should never be called for or delivered, and that differences only should be dealt with. It was open to the Court to find, against the form of the papers that passed and the testimony of the parties themselves, that, notwithstanding the ostensible terms, there was a secret understanding. The evidence supported the finding that there was no intention on the part of

any one to transfer any property to any one—that the transactions were merely bets on the rise and fall of the market, or gambling transactions.

The opinion evidence of two witnesses, so far as they assumed to deal with the question of the legality or illegality of the transactions, should not have been received; but, as no substantial wrong or miscarriage was occasioned, and a case was established against the defendant without the opinion evidence, the first proviso of sec. 746 (1) (*f*) of the Criminal Code should be given effect to.

Semble, that, upon the proper construction of sec. 704 of the Code, when upon the trial of a person charged under sub-clause (*b*) of sec. 201 (1) it is established that he has made or signed, or has acted, aided, or abetted in the making or signing of, a contract for the sale or purchase of the specified commodities, and there is no delivery at the time, the onus of shewing a *bond fide* intention to deliver or receive is upon the person charged.

Held, that the customer and Richmond & Co., having, by the aid of the defendant, committed the offence prohibited by sec. 201 (1) (*b*), the defendant had done acts for the purpose of aiding them to commit the offence and abetted them in the commission of the offence, and under sec. 51 of the Code, became a party to and guilty of the same offence, and there was no reason why he should not be charged as a principal.

The contracts were made in Canada:—*Pearson v. Carpenter* (1904), 35 S.C.R. 380.

Sub-section 3 of sec. 201 is a legislative declaration that an office or place of business of the character kept by the defendant is a common gaming house, and so a common nuisance, and that a person maintaining such a place is the keeper of a common gaming house; and this is an offence for which he may be indicted—a penalty being provided by section 951 of the Code; and therefore (Osler, J. A., dubitante), the conviction under sub-sec. 3 was properly made. *Rex v. Harkness*, 555.

5. *Vagrancy—Conviction—Evidence—Criminal Code, sec. 207 (l)—Habeas Corpus—Discharge.*—The evidence upon which a magistrate's conviction of the defendant under sec. 207 (l) of the Criminal Code for vagrancy was based, was, that, though never convicted, he was an associate of pickpockets, and was "known to the police authorities of Montreal as a professional pickpocket." There was no further material evidence against the defendant, though a number of circumstances were shewn which would create suspicions of his honesty. There was no evidence offered by the Crown that he had no means of earning a livelihood; the evidence of his being recently employed as an hostler was given on his behalf. He had \$40 on his person when arrested:—

Held, that, if there was some evidence that the defendant "for

the most part supported himself by crime," there was no evidence to warrant a finding that he had "no peaceable profession or calling to maintain himself by;" and he was discharged upon the return of a *habeas corpus*. *Rex v. Collette*, 718.

See SESSIONS—TRADEMARK.

CROWN.

See BILLS OF EXCHANGE.

CROWN LANDS.

See EXECUTION—WAY.

CRUELTY.

See HUSBAND AND WIFE, 3.

CULVERT.

See INJUNCTION.

DAMAGES.

1. *Reduction—Consent—New Trial—Rule 786—Quantum of Damages.*—The Court of Appeal pronounced judgment on the 4th April, 1905, dismissing the defendants' appeal except upon the question of damages. It was held that the damages assessed by the jury were excessive, and a new trial was ordered unless the plaintiff would consent to a reduction.

The certificate of this judgment not having issued, the Court on the 2nd June, 1905, reconsidered the matter, and,

acting under Rule 786, directed a new trial confined to the question of the amount of damages.

Held, following *Watt v. Watt*, [1905] A.C. 115, that the Court has no jurisdiction, without the defendants' consent, to make the new trial dependent upon the consent of the plaintiff to reduce the damages. *Hockley Grand Trunk R.W. Co.*, 363.

2. *Nervous Shock—Impact—Railway*.—The plaintiffs were driving on a highway in an enclosed vehicle which owing, as was found, to the negligence of the defendants, was struck by a moving car of the defendants, pushed a short distance sideways, and struck on the other side by another car moving in the opposite direction. The plaintiffs suffered no visible bodily injuries except slight bruises, but complained of mental or nervous shock, and a jury assessed damages therefor:—

Held, that damages of this kind were not recoverable notwithstanding the impact and the bodily injuries.

Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, and *Henderson v. Canada R.W. Co.* (1898), 25 A.R. 437, followed.

Judgment of TEETZEL, J., reversed. *Geiger v. Grand Trunk R.W. Co.*, 511.

See COMPANY. 2 — DEFAMATION — NEGLIGENCE — RAILWAY.

DEBTS.

See WILL.

DEDICATION.

See WAY.

DEED.

Description—House—Wall—Northerly Face of—Deviation in—Right to follow—Intersection.]—In a deed conveying land on which was erected a house which immediately adjoined another house to the north, one of the metes and bounds was, commencing from the intersection with the street of the production easterly to the street line of the northern face of the wall of the house upon the land conveyed, and running westerly along the production and limit between the house conveyed and the adjoining one, to the westerly limit of the lot. Where the said wall of the house conveyed extended beyond the rear wall of the adjoining house, it was cased with brick, nine inches thick, so as to cause it to project that distance beyond what would otherwise have been the division line between the two houses:—

Held, that the word "intersection" here meant "to divide or separate," and the northerly face of the wall must be followed no matter how devious its course might be, so as to include the northerly face of the brick casing. *Weston v. Smythe*, 1.

DEFAMATION.

Misrepresentation—Sale of Goods—Customers of Former Employer—Action—Slander—Case—Scope of Employment—Damages—Liability of Company—Judgment Against Joint Tort Feasors—Con. Rule 615.—The plaintiff company were the publishers of a Christmas annual, and had for years been selling it at a considerable profit, the defendant T. being in their employ as a salesman or agent, and as such had visited and sold the annual to their customers. T. left their employment and entered that of the defendant company, who decided to issue a similar annual, and sent T. out as a salesman. He went to some of the customers of the plaintiffs and by untrue representations, amongst others that "the defendant company had taken over that part of the plaintiffs' business, and that the plaintiffs were going out of that branch of business," sold annuals to those customers to the detriment of the plaintiffs' business and to the profit of the defendant company, who accepted and filled the orders and collected the price.

On the answers to questions put to the jury, the trial Judge gave judgment against T. for the damages found, and granted an injunction against him and dismissed the action as against the defendant company:—

Held, that T. was acting within the scope of his employment

in seeking to procure orders, and that the defendant company having availed itself of his acts, was liable for the representations made by him.

Held, also, that the action was not one of slander but an action on the case for false and malicious statements made in reference to the plaintiffs' business, and resulting in loss to the plaintiff, and that the defendant company, although incorporated, was liable.

Held, also, that the true measure of a master's liability is the same as if the act had been committed by himself, and the fact that the defendant company had made no profit out of the transaction made no difference as to the amount of the damages against it.

Although if one of two joint tortfeasors be sued and judgment recovered against him, that is a bar to further action against the two, here the action was brought against both and judgment obtained against one, and a motion for judgment was made against the other:—

Held, that both the company and the agent T. were liable.

The jury, in answer to a question in which they were asked in effect whether T. in uttering the words he did was acting within the scope of his employment by the company for their benefit, answered "No":—

Held, that the finding could not be sustained, and there being no reason to suppose that

new light could be thrown on the case by a new trial, and the Court having before it all the materials necessary for determining the question in dispute, under Con. Rule 615 judgment was directed to be entered against both the defendants. *The Sheppard Publishing Company, Limited v. The Press Publishing Company, Limited*, 243.

DESCRIPTION.

See DEED.

DETINUE.

See COMPANY, 2.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

See DISTRIBUTION OF ESTATES
—MORTGAGE, 3—WILL, 5.

DISMISSAL OF ACTION.

See PRACTICE.

DISTILLERIES.

See MUNICIPAL CORPORATIONS, 3.

DISTRESS.

Payment of Rent, after Distress, to Mortgagee—Continuation after Payment—Bailiff—

Costs of Distress—Costs of Action — Counterclaim.]— Rent being in arrear, the landlord distrained, and the tenant then paid the rent to the landlord's mortgagees, who had previously given him notice to pay to them (their mortgage money being in arrear), and threatened him with proceedings if he did not do so:—

Held, that the tenant, having paid the mortgagees under compulsion, was entitled to be relieved from the distress and from further liability to the landlord; but the distress was lawful when made, and the landlord was entitled to retain a sufficient quantity of the goods until the costs of the distress were paid.

The tenant sued the landlord and bailiff, claiming an injunction to restrain them from proceeding with the distress, and damages, and the landlord counterclaimed for the rent and costs of the distress:—

Held, that the action should be dismissed as against the bailiff with costs; that the landlord should have judgment against the plaintiff for the costs of the distress without costs of the counterclaim; and that there should be no costs of the action between the plaintiff and the landlord. *Puffer v. Ireland et al.*, 87.

DISTRIBUTION OF ESTATES.

1. *Ascertainment of Next of Kin — Legitimacy — Foreign*

Law—Conflict of Expert Testimony—Determination by Court.]—In an action by the children of a half-brother of an intestate to establish their status and rights as next of kin, it appeared that the mother of the intestate in 1824 was deserted by her husband, and believing him dead, in 1826 entered into marriage relations with another man, which continued until her death in 1833. The plaintiffs' father, the issue of this union, was born in 1829. The wife always remained unaware that her husband was not dead, and acted in good faith. He, in fact, survived her. All the events took place in the State of New York, where the parties were domiciled. The intestate died in Ontario, and his estate consisted entirely of personalty:—

Held, that the question of the legitimacy of the plaintiffs' father and the right of succession of his descendants to the intestate's property, depended upon the law of the State of New York.

The expert evidence as to the law being conflicting, the Court examined the authorities upon which the experts respectively relied, and reading these with the aid of the explanatory, critical, and argumentative testimony adduced, and discharging functions analogous to those of a special jury, determined that by the law of the State of New York, referred to in the judgment, the plaintiffs'

father was legitimate. *Hunt et al. v. Trusts and Guarantee Co.*, 147.

2. *Intestacy — Children of Father's Sister, and Grandchildren of Mother's Brother and Sisters—Devolution of Estates Act, R.S.O. 1897, ch. 129, secs. 37 to 55—Statute of Distributions 22 and 23 Car. II. ch. 10.*]—The word "prospectively" contained in sec. 37 of the Devolution of Estates Act, R.S.O. 1897, ch. 129, does not exclude the operation of the Statute of Distributions 22 and 23 Car. II. ch. 10, by making secs. 38 to 55 of the Devolution of Estates Act applicable to descents subsequent to 1886, such word having reference prospectively to the period from 1852 to 1886.

An intestate's father and mother were both dead, the intestate's estate consisting of real and personal property coming from neither of them, and the intestate's nearest relatives were children of the father's sister, and grandchildren of the mother's brothers and sisters; the children of the deceased sister were held to be entitled to the exclusion of the grandchildren. *Re McEachern*, 499.

DIVISION COURT.

1. *Service of Summons.*]—Except in the few special cases provided for by the Division Courts Act the bailiffs of the Courts have the right to serve

summonses, and a plaintiff is not entitled as of right to effect service himself.

Mandamus to a division court clerk to compel him to give a summons to the applicants for service refused. *In re Wilson v. McGinnis*, 98.

2. *Action against an Executor de son tort—Jurisdiction—Prohibition—R.S.O. 1897, ch. 60, sec. 72 (d).*]—An executor *de son tort* is not within the meaning of R.S.O. 1897, ch. 60, sec. 72 (d), giving enlarged jurisdiction to Division Courts, 'when the amount is ascertained by the signature of . . . the person whom, as executor or administrator, the defendant represents,' and a Division Court has no power in the same proceeding to declare a defendant executor *de son tort* and pronounce judgment against him as such for the amount claimed. *In re Dey v. McGill*, 408.

DIVISIONAL COURT.

See APPEAL.

DRAINAGE.

See INJUNCTION—WATER AND WATERCOURSES.

EASEMENT.

See CEMETERY.—INJUNCTION.

ELECTION.

See PARTIES.

ELECTIONS.

See PARLIAMENT.

ESTOPPEL.

See BILLS OF EXCHANGE.—JUDGMENT.

EVIDENCE.

1. *Discovery—Production of Documents—Privilege—Documents Secured in View of Possible Litigation.*]—Documents obtained by the solicitors of the plaintiffs to aid them in forming an opinion as to the legal rights of the plaintiffs in reference to a road, about which a dispute with the defendants had arisen, are privileged from production in an action brought as a result of the opinion formed by the solicitors, notwithstanding that an action was not expressly contemplated when the solicitors were instructed to obtain the necessary information and give the opinion.

Learoyd v. Halifax Joint Stock Banking Co., [1895] 1 Ch. 686, followed.

Decision of Teetzel, J., affirmed. *Township of Elmsley v. Miller et al.*, 343.

2. *Discovery—Examination of Officer of Company Party—Refusal to Answer—Remedy—Master in Chambers.*]—The Master in Chambers has no power to strike out the defence of a company defendant for refusal of an officer to answer questions upon his examination

for discovery, nor to order him him to attend again to make answer; the plaintiff's remedy, if he wishes to have the questions answered, is by motion to commit the officer.

Badgerow v. Grand Trunk R. W. Co. (1889), 13 P.R. 132, and *Central Press Association v. American Press Association* (1890), *ib.*, 353, applied and followed. *McWilliams v. Dickson Co. of Peterborough*, 639.

3. *Discovery—Production of Documents—Affidavit—Partnership—Master and Servant—Agreement to Share Profits—Statement Furnished by Master—Fraud.*]—*Held*, by Anglin, J., in Chambers, that, notwithstanding the language of sec. 3 of R.S.O. 1897, ch. 157, a statement of profits furnished by a master to his servant, where there is an agreement to share profits, is impeachable for fraud; and fraud being alleged by the plaintiffs (servants) in an action (*inter alia*) for an account of profits, the plaintiffs were entitled to discovery of a document in the possession of the defendant (master) shewing the basis of the statement of net profits furnished by the defendant.

Held, by a Divisional Court, upon appeal, not passing upon the questions with regard to the statute, that production of the document was properly ordered, having regard to the general rules relating to discovery and the other claims made in the action. *Cutten et al. v. Mitchell et al.*, 734.

See COMPANY, 4—CRIMINAL Law, 3—PARLIAMENT, 1—PARTNERSHIP—SEDUCTION.

EXECUTION.

Seizure of Product of Timber—Permit to Execution Debtor to Cut and Remove from Crown Lands—Lien—Partnership—Interest of Partner.]—An execution debtor was the holder of a permit to cut and remove railway ties from Crown Lands. He entered into partnership with another person in the business of tie manufacturers, to be carried on upon the lands comprised in the permit, and the partnership got out ties to fill a contract with a railway company. The ties were seized by a sheriff under the execution against the debtor, and claimed by the partnership. It was conceded that the execution was not a lien upon any of the timber embraced in the permit until severed, but it was contended that the moment there was a severance the timber cut vested in the debtor, and *eo instanti* the execution attached:—

Held, that there could be no objection to the execution debtor forming a partnership for the production of the ties with a person willing either to put in cash as capital or to provide the plant, supplies, and other materials necessary to enable the work of production to be proceeded with. The product would be the property of the

partnership, and not that of the individual who held the permit. Such an agreement was not in its nature either void or voidable as against creditors. The interest transferred by the debtor was not exigible under a writ, and was not affected by any lien or charge arising therefrom.

The execution creditors were entitled to seize the partnership interest of their debtor, but no claim of that kind was before the Court. *Canadian Pacific R.W. Co. et al. v. Rat Portage Lumber Co.*, 273.

See INTEREST—SOLICITOR, 2.

EXECUTORS AND ADMINISTRATORS.

Action—Criminal Conversation—Death of Plaintiff—Revivor—Trustee Act, sec. 10—Appeal to Court of Appeal—Issue of Order from High Court—Indorsement—Rule 399.]—

The provisions of sec. 10 of the Trustee Act, R.S.O. 1897, ch. 129, apply to an action for criminal conversation; and where the plaintiff dies *pendente lite* the action may be continued in the name of his personal representative.

Where at the time of the abatement an appeal to the Court of Appeal is pending, an order of revivor may, nevertheless, issue from the High Court of Justice.

The absence of the indorsement on the order of revivor

required by Con. Rule 399, notifying the opposite party of the time within which to apply to discharge the order, will not be regarded as a ground for setting aside the order upon a motion for that purpose made within the proper time. *C. v. D.*, 641.

See DIVISION COURT, 2—WILL, 5.

EXEMPTIONS.

See ASSESSMENT AND TAXES.

EXONERATION.

See WILL, 1.

EXPROPRIATION.

See RAILWAY.

FACTORY.

See MASTER AND SERVANT, 3.

FENDERS.

See CRIMINAL LAW, 1.

FORECLOSURE.

See MORTGAGE.

FOREIGN LAW.

See DISTRIBUTION OF ESTATES, 1.

FOREIGNER.

See PARLIAMENT, 3.

FORFEITURE.

See COMPANY, 6.

FORGERY.

See BILLS OF EXCHANGE—
TRADEMARK.

FRAUD.

See EVIDENCE, 3—JUDGMENT
—RELEASE.

FREE PASS.

See RAILWAY, 3.

GAMING HOUSE.

See CRIMINAL LAW, 4.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GIFT.

See REVENUE.

HABEAS CORPUS.

See CRIMINAL LAW, 5.

**HAMILTON STREET RAILWAY
COMPANY.**

See STREET RAILWAYS.

HIGH COURT OF JUSTICE.

See BILLS OF EXCHANGE, 3.

HIGHWAYS.

See WAY.

HOUSE.

See DEED.

HUSBAND AND WIFE.

1. *Alimony—Husband's offer to pay for necessities.*—It is not a sufficient answer to a motion for interim alimony where cruelty is alleged, that the husband has offered to allow the wife to get whatever is necessary for the house, in which both are living but not on friendly terms, and to pay for all such goods.

Snider v. Snider (1885), 11 P.R. 140, distinguished.

Lovell v. Lovell (1905), 5 O.W.R. 401, 640, followed.
Theakstone v. Theakstone, 386.

2. *Judgment Against Separate Estate of Married Woman—Proceeds of Life Policy Payable to Her—Separate Estate—Garnishment—R. S. O. 1897, ch. 203, sec. 159—R.S.O. 1897, ch. 163, sec. 4.*—The

plaintiff was a judgment creditor of the defendant, by virtue of a judgment payable out of her separate estate, recovered on bills of exchange accepted by the defendant, a married woman engaged in trade, for her trade debts, subsequent to 13th April, 1897.

Afterwards on the death of her husband, she became entitled to the proceeds of a policy of insurance on his life, which he had made payable to her as beneficiary:—

Held, that the effect of sec. 159 of ch. 203 R.S.O. 1897 is to create a statutory trust of the money, payable under the policy, in favour of the wife without restraint on anticipation; that on the death of her husband, the absolute right to the money became vested in her, her original interest in the trust being separate property within the contemplation of The Married Woman's Property Act, R.S.O. 1897, ch. 163, and that the fruits of the trust must be regarded as separate property and as such liable to satisfy the plaintiff's judgment. *Doull v. Doelle*, 411.

3. *Alimony—Cruelty—Insufficient Evidence of—Non-revival of Prior Condoned Acts.*—The Courts scrutinize very closely retaliatory acts of alleged violence and cruelty on the part of a husband arising out of the wife's headstrong and irritating conduct, and will refuse, unless such acts are accompanied by

intemperate and excessive violence, to call them acts of cruelty, and so effective in reviving prior condoned acts of cruelty and misconduct.

In 1895 the plaintiff and defendant, who prior thereto had been living together, were married, but thereafter only lived together at intervals, the plaintiff living apart from defendant, and carrying on what she called a hospital for pregnant women. In 1904 on the defendant insisting on it, the plaintiff returned to the defendant's house, everything going on satisfactorily until the plaintiff desired to carry on the alleged hospital business in the house, which the defendant refused to consent to. The plaintiff then rented a house for herself, and during the defendant's temporary absence, stripped the defendant's house of nearly all the furniture, removing it to her own house. This greatly incensed the defendant, and on the plaintiff using foul and abusive language to him, he committed, as the plaintiff alleged, an aggravated assault on her, and by his conduct rendered it unsafe for her to live with him, and revived prior condoned acts of cruelty and misconduct:—

Held, that the defendant's acts were not of such an excessive and intemperate character as would render it unsafe for the plaintiff to live with him, and revive the prior condoned acts, for not only did it appear that the alleged assault was grossly exaggerated, but was

brought on by the plaintiff herself, whose whole object was to goad the defendant into acts of violence which would justify an action for alimony. *Payne v. Payne*, 742.

See INSURANCE, 3.

ICE.

See NEGLIGENCE, 1.

ILLEGALITY.

See CONTRACT.

IMPROVEMENTS.

See WATER AND WATER-COURSES, 1.

INCOME.

See ASSESSMENT AND TAXES.

INCUMBRANCE.

See VENDOR AND PURCHASER, 2.

INFANT.

See MASTER AND SERVANT, 3.

INJUNCTION.

Water and Water Courses—
Culvert—Drain—Revocable License therefor—Damages—

Easement—Prescription.]

The owner of a farm consented to the water, which came through a culvert, being carried off by means of a drain, which he himself dug, through the corner of the farm, into a ravine. No written agreement was entered into therefor, nor was there any expenditure of public money thereon, nor any consideration given for its use:—

Held, that a revocable license merely was constituted, which the plaintiff, claiming through such owner, was entitled to revoke; and even if a valid agreement with such owner were established, it would not be binding on the plaintiff, for no notice or knowledge thereof was proved, knowledge merely of the existence of the culvert and drain not being sufficient.

Held, also, that the plaintiff was entitled to an injunction, the damages allowed him—\$100—being under the circumstances substantial, while the cause was a recurring one, which, if allowed to continue, might ripen into an easement by prescription. *Taylor v. The Corporation of the Township of Collingwood*, 182.

See STREET RAILWAYS, 2.

INSURANCE.

1. Fire Insurance—Foreign Company—Delivery of Policy

—*Cause of Action Enforceable in Ontario—Place of Payment—Home Office—Lex loci contractus—R.S.O. 1897, ch. 203, sec. 143.*—The insured residing in Ontario applied through an insurance broker in Montreal for an insurance policy on property in Ontario in the defendant company, which was incorporated under the laws of one of the States of the United States and had its home office in that State. The evidence of the insured was that he received the policy through the mail from the broker—and the evidence of the company was that it was delivered to the broker as the assured's agent who was not an agent of the company which had no agent or officer in Ontario. No place of payment was named in the policy:—

Held, that the plaintiffs had not proved a cause of action upon which they were entitled to sue the company in Ontario; and that in the provision as to committing a policy to the post office the words "to be delivered or handed over to the assured, his assign or agent in Ontario" in sec. 143 of ch. 203, R.S.O. 1897, contemplates a committing to the post office of the policy by the insurer addressed to the insured his assign or agent in Ontario; and the provision therein, that in such event the money should be payable at the office . . . in Ontario shews that the section was intended to apply to companies having an office or agent in Ontario and not to a

company which has in no way brought itself or its business within the limits of the Province.

Held, also, that the company not having complied with the Insurance Act R.S.O. 1897, ch. 203 in regard to license or registration, was precluded by sec. 85 of that Act from entering into a contract with any one in Ontario. *Burson v. German Union Insurance Company*, 238.

2. *Life Insurance—Beneficiaries, designation of—Legal heirs—Preferred beneficiaries—Children—Death of beneficiary—Further designation—R.S.O. 1897, ch. 203, sec. 159, sub-sec. 1.*—By a beneficiary certificate issued in 1901, a benevolent society agreed to pay \$2,000 to the beneficiary or beneficiaries designated therein, with a reservation of powers of revocation and substitution. The beneficiaries were designated by an endorsement whereby payment was to be made to three named persons, "executors in trust for legal heirs," the insured having at this time a son and grandson living. In 1902, after the death of the son, the insured by a declaration in writing directed the moneys to be paid to a daughter-in-law, and by his will he also so assumed to dispose of the moneys. The insured died in 1904, leaving him surviving his grandson and several brothers and sisters. On a claim

made by the grandson as the legal heir:—

Held, that by the use of the words "legal heirs" an irrevocable declaration was not created in favour of the persons who would answer that description on the death of the insured as preferred beneficiaries under sec. 159 of the Insurance Act, R.S.O. 1897; ch. 203, for, according to the true construction of the contract, "legal heirs" meant children, and on the death of the insured's only son the designation failed, and the insured had therefore the right to designate another beneficiary, which was properly exercised in favour of the daughter-in-law.

Judgment of MEREDITH, C.-J.C.P., 9 O.L.R. 517, affirmed. *Re Farley*, 540.

3. *Life Insurance—Assignment—Assignee's Selection of Option—Revocation of Selection—Husband and Wife—Declaration in Wife's Favour—Attachment of Debts.*]—The assured assigned shortly before its maturity an endowment policy to a creditor by an assignment absolute in form, there being an agreement however that the creditor should apply to the company for the cash surrender value and should pay the surplus thereof over his indebtedness to the assured's wife. The assignee after the time limited by the policy for the purpose elected to take the cash surrender value. After this a judgment creditor of the assured

obtained an attaching order against the company. The assignee then before any action had been taken by the company in respect of the election made by him revoked it and the husband executed a declaration that the policy was to be held, subject to the assignment, for the benefit of his wife:—

Held, that the assignee's election not having been made within the time limited was a mere proposal to the company; that his revocation before action taken by the company put an end to it; and that the cash surrender value was not payable by the company.

Held, also, that in any event, notwithstanding the attaching order, the assured's declaration in his wife's favour took effect, and defeated the attaching creditor's claim.

The principle of *Weekes v. Frawley* (1893), 23 O.R. 235, approved and applied. Judgment of WINCHESTER, Co. J., affirmed. *Fisken v. Marshall*, 552.

See HUSBAND AND WIFE, 2.

INTEREST.

Moneys made under Execution—Reversal of Judgment—Liability to Refund—Rate of Interest—Payment into Court.]—Under a judgment against the defendant, the plaintiff issued execution and realized a sum of money which was in his hands when the judgment was reversed, and he became liable to repay it

to the defendant. The money, however, was claimed by another execution creditor, and the plaintiff gave notice of an application for an interpleader order, but did not proceed with it. By consent of all parties the money was paid to the solicitor for the defendant, but without interest.

Held, that the plaintiff was liable for interest, notwithstanding the conflict as to who was entitled to the money, for he could have protected himself by paying the money into Court or obtaining a waiver of the right to interest; and the interest should be at the legal rate of 5 per cent., for the same reason. *Adams v. Cox et al*, 96.

See MORTGAGE, 1, 2.

INTERPLEADER.

See VENDOR AND PURCHASER, 2.

INTESTACY.

See DISTRIBUTION OF ESTATES.

INTOXICATING LIQUORS.

See MUNICIPAL CORPORATIONS, 6, 7, 8.

JOINT TORT FEASORS.

See DEFAMATION—PARTIES.

JUDGMENT.

Procurement by Fraud and Perjury—Right to Attack in

Subsequent Action—Fraudulent Assignment—Action to Set aside—Res Judicata—Garnishing Proceeding in Division Court.]—When it can be shewn that a judgment, whether foreign or domestic, has been obtained by fraud, it cannot be held binding upon the party against whom the fraud has been practised; and such fraud may be shewn although it may involve a reconsideration of the very facts upon which the former judgment was recovered, and although it may consist in the presentation to the court of evidence that the judgment impeached was obtained by perjured evidence to which the Court upon the first trial gave credit. There is no distinction between the fraud which consists in presenting perjured evidence to the Court, and that which is collateral to the merits of the case.

In an action to set aside as fraudulent and void an assignment of salary by one defendant to the other, the defendants pleaded *res judicata*, upon which the plaintiff joined issue. At the trial the defendants proved a judgment of a division court, in a garnishee proceeding, to which the plaintiff and defendants were parties, and in which the validity of the same assignment was the question for determination. The trial Judge found that by suppressing material facts and by giving evidence that was wilfully false, the claimant in the division court proceeding, who was one

of the defendants in the action, procured from the Judge in the division court an adjudication that the assignment was valid:—

Held, that the plaintiff was entitled to impeach the judgment in the division court, though he had not directly attacked it, as he should have done by amendment when *res judicata* was pleaded; and, upon the evidence, that the assignment was fraudulent and void. *Aboulloff v. Oppenheimer* (1882), 10 Q.B.D. 295, and *Vadala v. Larves* (1890), 25 Q.B.D. 310, followed.

Woodruff v. McLennan (1887), 14 A.R. 242, and *Hilton v. Guyot* (1895), 159 U.S. 113, not followed.

Judgment of ANGLIN, J., reversed. *Johnston v. Barkley et al*, 724.

See APPEAL—DEFAMATION—INTEREST.

JURISDICTION.

See COMPANY — DIVISION COURT, 2 — INSURANCE, 1 — PRACTICE.

JURY NOTICE.

See PRACTICE.

LACHES.

See BILLS OF EXCHANGE—COMPANY, 6.

LEGACIES.

See WILL, 8.

LETTERS.

See VENDOR AND PURCHASER,

1.

LIBEL.

See DEFAMATION.

LICENSE.

See INJUNCTION—MUNICIPAL CORPORATIONS, 8.

LIEN.

See EXECUTION—MECHANICS' LIEN—SOLICITOR, 2.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

See PRACTICE—RAILWAY, 3.

LOAN CORPORATIONS ACT.

See COURT OF APPEAL, 2.

LOCAL OPTION.

See MUNICIPAL CORPORATIONS, 6, 7, 8.

MALICE.

See CONSTABLE.

MARGINS.

See BROKER—CRIMINAL LAW,
4.

**MARRIED WOMEN'S
PROPERTY.**

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. *Nuisance—Course of Employment—Piling Ties on Highway.*—A number of worn out railway ties were taken from the line of railway during ordinary working hours by section men employed by the defendant company and were piled on a highway at a railway crossing, the foreman of the section men intending to take them to his house for firewood. It was the custom of the section men to get rid of the worn out ties either by burning them beside the track or by taking them home for firewood. The plaintiff's horse while being driven along the highway shied at the ties and the plaintiff was injured:—

Held, that there was evidence to support the jury's finding that the ties had been placed upon the highway in the course of the employment of the section men, and that the defendants were therefore *prima facie* responsible, but that there being no finding that the ties were a nuisance in the sense of being calculated to frighten horses

generally, this being an essential element of liability, a new trial was necessary.

Judgment of a Divisional Court reversed. *Forsythe v. Canadian Pacific Railway Company*, 73.

2. *Breach of Contract—Breach Induced by Third Person—Trade Union.*—It is an actionable wrong to persuade a servant to break his contract with his master, and it is no excuse that the persuader is not actuated by ill-will to the master but acts in good faith in pursuance of the provisions of the constitution of a trade-union of which he and the servant are members.

The principles of *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A.C. 239, and *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K.B. 732, applied. *Brauch v. Roth*, 284.

3. *Injury to Servant—Employment of Child in Factory—Misrepresentation as to Age—Dangerous Machinery—Warning—Negligence—Jury—New Trial.*—The Court, OSLER, J.A., *dubitante*, affirmed the judgment of a Divisional Court, 8 O.L.R. 419, setting aside a nonsuit and directing a new trial of an action for damages for injuries received by the infant plaintiff while employed by the defendants in their factory, he being only ten years of age, but having wilfully misrepresented his age as four-

teen when seeking the employment. There was some evidence that sufficient warning had not been given by the defendants to the plaintiff of the dangerous nature of the machines in the room in which he was at work, although not employed at them. *McIntosh v. Firstbrook Box Co.*, 526.

See *Schwob v. Michigan Central R. W. Co.*, 647.

See DEFAMATION—EVIDENCE, 3—NEGLIGENCE.

MASTER IN CHAMBERS.

See EVIDENCE, 2.

MASTER'S OFFICE.

Affidavit Verifying Mortgage Account — Right to Cross-examine—*Con. Rules 490-2, 668-9, 683.*]—*Con. Rule 490* whereby a person who has made an affidavit to be used in any action or proceeding other than on production of documents, may be cross-examined thereon, has no application to proceedings in the Master's office; and therefore there is no right under that rule to cross-examine on an affidavit verifying a mortgage account on a reference. *Plenderleith v. Parsons*, 436.

See COMPANY, 2.

MECHANICS' LIEN.

Material Supplied—Request, Privity or Consent or Credit of

Owner—R.S.O. 1897, ch. 153, sec. 2, sub-sec. 3 and sec. 4.]—Under the Mechanics' Lien Act, in order to create a lien on the property of the owner in favour of the material man, there must in all cases be a request of the owner and the furnishing of the materials in pursuance of that request, either upon the owner's credit or on his behalf or with his privity or consent or for his direct benefit. In the circumstances of this case, it was held that the person who had furnished the materials had a direct lien upon the land as against the owner, and not a sub-lien upon the moneys owing by the owner to the contractor or upon the statutory drawback.

Graham v. Williams (1884), 8 O.R. 478; (1885), 9 O.R. 458; *Blight v. Ray* (1893), 25 O.R. 415; *Gearing v. Robinson* (1900), 25 A.R. 364, considered. *Slatery v. Lillis*, 697.

MISREPRESENTATION.

See DEFAMATION.

MISTAKE.

See BILLS OF EXCHANGE.

MORTGAGE.

1. *Interest on Interest post diem—Construction of Proviso.*]—A mortgage contained the following proviso: "Provided this mortgage to be void on payment of five thousand dollars"

with interest from the date hereof at the rate of eight per cent. per annum as follows: The said principal sum at the expiration of one year from the date hereof . . . and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every twelfth day of November, February, May, and August hereafter. . . . In the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same":—

Held, MAGEE, J., dissenting, that the proviso, taken as a whole, did not entitle the mortgagees to interest upon interest accruing after maturity of the principal money.

Per MAGEE, J., that the proviso made the simple interest payable quarterly after default in payment of principal, and entitled the mortgagees to compound interest thereon, but not with quarterly rests. *Imperial Trusts Co. v. New York Security and Trust Company*, 289.

2. *Interest—Payment—Advances by Agent.*—C. acted as

agent for the plaintiff in investing money for her upon a mortgage, and as agent for the owners of the equity of redemption in collecting the rents of the mortgaged land until July, 1904, after which he collected these rents as agent for the plaintiff, *quod* mortgagee in possession. The rents proving insufficient to pay the plaintiff's interest in full, C. nevertheless remitted to the plaintiff half-yearly the full amount of the interest accrued, making up the deficiency out of his own pocket:—

Held, upon the evidence, that the advances made by C. were not intended to be payments in satisfaction of the plaintiff's claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom, and therefore that the plaintiff, in proving the amount due upon her mortgage, was entitled, as against a second mortgagee, to include the sums paid by C. for interest out of his own pocket.

Simpson v. Eggington (1855), 10 Ex. 845, followed.

Decision of MEREDITH, J., reversed. *Glascott v. Cameron et al.*, 399.

3. *Foreclosure—Parties—Trustees—Devolution of Estates Act*—60 Vict. ch. 14, sec. 29 (O.), 54 Vict. ch. 18, sec. 1 (O.)—R.S.O. 1897, ch. 121, sec. 13.]—By sec. 29 of 60 Vict. ch. 14 (O.), sec. 1 of 54 Vict. ch. 18 (O.), is interpreted as applying only to the estates of persons dying on or after May 4th, 1891,

and this interpretation is made retrospective, save as to conveyances theretofore made.

A husband, who with his wife had jointly mortgaged certain lands, died in 1890, having appointed his wife his executrix and devised to her all his estate. The wife died in the same year, having appointed two executors, and devised all her estate to the plaintiff. Default having been made in the payment of the mortgage which had been assigned to two persons as trustees, although no trust appeared on the face of the assignment, who had taken a renewal with a covenant to pay. Subsequent to the passing of sec. 13, R.S.O. 1897, ch. 121, the surviving assignee brought an action against the wife's executors and obtained judgment of foreclosure and entered into possession. He subsequently sold the lands to one of the defendants, who also entered into possession and mortgaged to the other defendant. In a redemption action brought by the daughter of the mortgagors against the defendants:—

Held, that the husband and wife having died before the 4th of May, 1891, the equity of redemption at the time of the foreclosure action and judgment was vested in the wife's executors, so that the judgment recovered against them was effective, the daughter not being a necessary or proper party.

Held, also, that the personal representatives of the deceased

assignee were not necessary parties for under sec. 13 of the R.S.O. 1897, ch. 11, the mortgage was vested in the two assignees jointly, so that the survivor was entitled to receive the money and enforce payment, although, but for that statute, had the defendants objected, the personal representatives would have been necessary parties. *Plenderleith v. Smith*, 188.

See DISTRESS — MASTER'S OFFICE—WILL, 1.

MORTMAIN.

See WILL, 4.

MUNICIPAL CORPORATIONS.

1. *Elevated Highway—Repair—Guard-rails—Accident—Defective Harness—Negligence of Driver—Want of Knowledge of Plaintiff.*—The female plaintiff was being driven by her mother over a highway at a point where a hill had been partly cut down and the valley filled up making a good level road from 7 to 10 feet above the natural level of the ground. The horses and conveyance belonged to the mother and the neck-yoke and harness were defective to her knowledge, but there was no evidence that the daughter was aware of that fact. The neck-yoke broke, the control of the horses was lost and the conveyance went over the

bank and the daughter was injured :—

Held, that it was the defendants' duty to keep the highways in such a condition of repair as the reasonable demands of the traffic over them from time to time required having regard to their means of performing such duty; that the failure of the defendants to place guard-rails or a protection along the embankment was a breach of that duty, and that their fault was the proximate cause of the female plaintiff's injury.

The driver was driving carelessly and the defective harness and her carelessness largely contributed to the accident :—

Held, that although her contributory negligence would have been an answer to any claim by herself it could not be said that it was the proximate cause of the daughter's injury.

Held, also, that the mother's negligence should not be attributed to the daughter who was ignorant of the state of the harness, etc., and in the absence of such knowledge the defence of her contributory negligence failed. *Plant v. The Corporation of the Township of Normanby, et al.*, 16.

2. *By-law Respecting Cab Stands—Cab Waiting for Hire.*]—A livery stable keeper made an agreement with the proprietors of a hotel to keep at all times three carriages in attendance at the hotel ready for immediate use by guests, each carriage to be deemed as hired

by the proprietors, from the time of attendance until dismissed or engaged for use by a guest, at the rate of one cent an hour, and the proprietors made themselves responsible for the payment by guests of the fees properly chargeable :—

Held, that in keeping carriages in attendance pursuant to this agreement the livery stable keeper was not guilty of a breach of a municipal by-law providing that no cab should stand upon any street while waiting for hire or engagement, or while unengaged.

Conviction quashed. *Rex v. Maher*, 102.

3. *Waterworks—Breweries—Distilleries—Illegal Rate.*]—The rate which by 24 Vict. ch. 56, the city of Hamilton is empowered to charge proprietors, occupants or others, for water supplied to them, must be an equal rate.

Attorney-General of Canada v. Corporation of Toronto (1892), 23 S.C.R. 514, followed.

Where, therefore, by a by-law passed therefor a higher rate was imposed on distillers and on brewers than on other manufacturers, such rate was held to be illegal. *The Hamilton Distillery Company v. The Corporation of the City of Hamilton. The Hamilton Brewery Co. v. The Corporation of the City of Hamilton*, 280.

4. *Non-repair of Highways—Street Carried Away by Natural Stream—Liability.*]—

Without any fault on the defendants' part a rapid natural stream running through their town changed its course, and in so doing carried away part of the street upon which certain of the plaintiff's lands were situate:—

Held, that the defendants were not bound to replace it under their statutory duty to repair highways; nor were they liable for any depreciation in the value of the plaintiff's property. *Cummings v. The Corporation of the Town of Dundas*, 300.

5. *By-laws for Raising Money—Sanction of Electorate—Variance from—Sidewalks—Width of—Ultra Vires.*]—A municipal by-law, duly passed and approved by the electors, provided for raising money on debentures to be applied solely in the construction of sidewalks along a certain street, to be completed during 1904, and to be five feet wide; and it delegated the matter of line or grade to the city engineer. Its validity being objected to in 1905, two further by-laws were passed adopting the engineer's plan, and providing for the construction of the sidewalks during 1905, with a width of four feet only; but these were not submitted to the electorate:—

Held, that these two last by-laws were *ultra vires* as extending the time allowed by the first one for construction of the sidewalks, and altering the width, and so varying the purpose for which the money had

been voted under it. Injunction granted to restrain the raising of the money. *Cleary v. Corporation of the Town of Windsor*, 333.

6. *Intoxicating Liquors—By-law—Local Option—Voting on By-law—Irregularities—Saving Clause of Statute.*]—Upon an application to quash a local option by-law of a village, approved by the electors by a vote of 124 to 117, it was alleged that in taking the vote the requirements of the Municipal Act had not been complied with, in that: (1) no newspaper was designated by the council wherein the by-law should be published; (2) one person was not appointed to attend the polling on behalf of those interested on each side; (3), persons were allowed to vote who were not so entitled; (4) no compartment was provided wherein a voter could mark his ballot screened from observation; (5), other persons were present in the compartment with the voter; (6) other persons were allowed to be in a position to see how the voter marked his ballot; (7) persons were allowed to be in the polling place who were not entitled to be there; (8) the returning officer did not perform various duties required of him at and after the close of the poll.

Some of the allegations were disproved in fact. As to matters which were proved:—

Held, that they were irregularities which did not affect the

result, the voting having been conducted in accordance with the principles laid down in the Act, within the meaning of sec. 204; and the motion was refused.

Decision of *MAGEE, J.*, affirmed. *Re Dillon et al. and Village of Cardinal*, 371.

7. *By-Law—Local Option in Intoxicating Liquors—Right of Council to Pass upon By-law Approved by Electors—Procedure at Meetings—Defeat of Motion—Subsequent Re-introduction and Adoption—Statute, Imperative or Directory.*—A local option by-law of a township was voted upon and approved by the electors on the 2nd January, 1905, and was finally passed by the unanimous vote of the council at a special meeting held on the 21st January, 1905. It was objected that the council had no power to pass the by-law on that day, because at a meeting of the council on the 9th January, when only four of the five members were present, a motion for the final passing was negatived as the result of two voting for the motion and two against:—

Held, that it was competent for the council at the special meeting of the 21st January to reconsider their action, to reverse it, and, without again introducing and submitting the by-law to the vote of the electors, to pass it.

Re Wilson and Town of Ingersoll (1894), 25 O.R. 439, commented upon.

Per ANGLIN, J.:—The first sentence of sec. 373 of the Municipal Act, 3 Edw. VII. ch. 19 (O), is not imperative; notwithstanding the approval of the electors, the council may still reject the by-law, and are not bound to pass it.

Decision of *BRITTON, J.*, affirmed. *Re Dewar and Township of East Williams*, 463.

8. *By-law Limiting Number of Tavern Licenses and Prescribing Accommodation—"License Year"—Liquor License Act—Objections to Procedure—Validity of By-law.*—A by-law passed by the council of a town before the 1st March, 1905, limiting the number of tavern licenses, prescribing the accommodation to be possessed by taverns, and fixing the amount of license duties, was held not to be invalid because it omitted the words "beginning on the first day of May," after the words "license year," in prescribing the number of tavern licenses for the "ensuing license year."

In prescribing the accommodation for taverns the by-law did not limit its provisions to the ensuing license year, but was so general that it might apply to all future years:—

Held, that the scope of the by-law being limited on its face to the license year 1905-1906, the general words of the clause dealing with accommodation were limited to that year.

Sections 20 and 29 of the Liquor License Act, R.S.O. 1897, ch. 245, considered.

Objections to the procedure of the council in relation to the passing of the by-law were overruled, the by-law being valid on its face, none of the objections having been raised by any member of the council, and the matters objected to being matters of internal regulation. *Re Caldwell and Town of Galt*, 618.

9. *Contract—By-law—Purchase of Land—Conveyance to Corporation—Attempted Rescission.*]—A municipal council desiring to maintain as required by statute (3 Edw. VII. ch. 19, sec. 524) an industrial farm passed a by-law directing that "a farm be purchased for an industrial farm." Tenders were then called for; a committee was appointed to examine the properties offered, that of the plaintiff being among them; the plaintiff's tender was accepted; the title to his property searched by the corporation's solicitor; and a conveyance of the property to the corporation obtained and registered. A cheque in the plaintiff's favour for the purchase money was made out and signed by the proper officers, but before its delivery to the plaintiff a by-law was passed by the council rescinding the former by-law, ordering the cheque to be cancelled, and directing the property to be reconveyed to the plaintiff:—

Held, that the transaction was an executed one, the benefit

of which the corporation had obtained, and, notwithstanding the absence of a by-law specifically authorizing it, could not be rescinded against the will of the plaintiff, in whose favour judgment for the purchase money was accordingly given. *Macartney v. County of Haldimand*, 668.

See PRACTICE—WAY.

NEGLIGENCE.

1. *Accident—Cause of—Failure to Disclose—Contributory negligence—Hole in Ice—Navigable Waters.*]—The defendants were the owners of a tug which had been laid up for the winter in a harbour alongside of their dock, being a place accessible to, but not frequented by, the public. The tug accidentally filled with water and sank, breaking the ice, and leaving open water above the deck, over which fresh ice formed. This was cut away by the defendants with the object of raising the tug, and while in this condition, the body of the plaintiff's husband was found lying on his back with his feet and legs on the surrounding ice and the head in the water. It appeared that on the evening before the finding of the body the deceased was in a state of intoxication. To a question put to the jury, whether deceased by means of ordinary care, could have avoided the accident; and how he could have so avoided it, they answered, "Yes, he might have

taken another road; or, if sober, on a bright night, he might have avoided the hole:—

Held, that no negligence on the part of the defendants was established, for it was quite as reasonable to conclude that deceased voluntarily sat down on the edge of the hole and perished from exposure, as that he walked into the hole.

Held, also, that the answer of the jury to the question put to them was not one in favour of contributory negligence. *Plouffe v. The Canada Iron Furnace Company, Limited*, 37.

2. *Railway—Injury to Person Crossing Track—Failure to Look for Train—Contributory Negligence—Case for Jury.*—The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries.

Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury.

Morrow v. Canadian Pacific R.W. Co. (1894), 21 A.R. 149, and *Vallee v. Grand Trunk*

R.W. Co. (1901), 1 O.L.R. 224, followed. *Sims et al. v. Grand Trunk R.W. Co.*, 330.

3. *Effective Cause—Accident—Liability—Allowing Guy Wire to Hang Loose—Contact with Live Wire.*—The defendant company's workmen while straightening a pole to which a guy wire was attached, cut the wire, allowing it to hang loose, and, either by these workmen, or some third party, as to which there was no evidence, it was thrown across a power wire so as to become a live wire, whereby the plaintiffs coming in contact therewith were injured:—

Held, that the original negligence of the workmen of the defendant company was an effective cause of the injury to the plaintiffs and that the defendant company were liable therefor. *Labombarde v. Chatham Gas Company and the Corporation of the City of Chatham*, 446.

4. *Railway—Negligence—Neglect of Statutory Warning—Collision at Crossing—Contributory Negligence—Nonsuit.*—The deceased, who was well acquainted with the locality, while driving along a highway running in the same direction as and crossing a railway, was killed at the crossing by a locomotive, running alone, coming from a direction behind him. The trial Judge left it to the jury to say whether there was negligence on the part of the defendants, and whether the deceased could with ordin-

ary diligence have seen the engine in time to avoid the collision, and whether he was guilty of any want of ordinary care and diligence which contributed to the accident.

The jury found that the engine was going unusually fast; that the whistle was sounded at a crossing three-fifths of a mile off, but was not continued at the other crossings, and that the deceased was not guilty of contributory negligence:—

Held, that the case had been properly left to the jury, and that the verdict not being against the weight of evidence ought not to be disturbed. *Peart v. The Grand Trunk Railway Company*, 753.

See *SCHWOOB v. MICHIGAN CENTRAL R. W. Co.*, 647—MASTER AND SERVANT—MUNICIPAL CORPORATIONS—RELEASE—WATER AND WATERCOURSES, 2—WAY, 2, 3.

NERVOUS SHOCK.

See DAMAGES, 2.

NEXT OF KIN.

See DISTRIBUTION OF ESTATES, 1.

NEW TRIAL.

See COURT OF APPEAL, 3—DAMAGES, 1.

NON-REPAIR.

See WAY, 2, 3.

NOTICE.

See COLLATERAL SECURITY—COMPANY, 6—WAY, 2, 3.

NUISANCE.

See CRIMINAL LAW, 1—MASTER AND SERVANT, 1.

OFFICER.

See EVIDENCE, 2.

ORDERS.

See EXECUTORS AND ADMINISTRATORS.

PARLIAMENT.

1. *Corrupt Practices — Incriminating Evidence—Certificate of Judge—Election Act—R.S.O. 1897, ch. 9, sec. 189 (a) (b)—Evidence Act, 4 Edw. VII., ch. 10, secs. 21 (O.).*—Where upon a summons calling on the defendant to shew cause why he should not be found guilty of certain alleged corrupt practices under the Ontario Election Act, R.S.O. 1897, ch. 9, the only evidence taken was his own, and was given by him under the general objection that he should not be called on to criminate himself:—

Held, that by virtue of sec. 189 (a) (b) of the Election Act, R.S.O. 1897, ch. 9, the defendant having answered truly all questions put to him, was entitled to be indemnified against any penal results of his disclosures, and could not be convicted on his own testimony.

Held, also, that sec. 21 of the Evidence Act, 4 Edw. VII., ch. 10 (O.), had no application, inasmuch as this was not a case where "but for that section the witness would have been excused from answering." *In re Sault Ste. Marie Provincial Election, 1903. Lamont's Case*, 85.

2. *Judgment Voiding Election—Dissolution of Legislature—Effect on Pending Appeal—Costs.*]—Where, after an appeal from the judgment of the trial Judges voiding the election of the respondent had been argued, and while it was standing for judgment, the Legislative Assembly was dissolved:—

Held, that the Court of Appeal could make no order, as to costs or otherwise. *Re North York Provincial Election, Kennedy v. Davis*, 93.

3. *Corrupt Practices—American Citizens—Tort Committed Within Province—Service out of Jurisdiction—R. S. O. 1897, ch. 9, secs. 162, 165, 166, 188, sub-sec. 5—Con. Rule 162 (e)—Election Court Rule LXIV.*]—American citizens having intervened in the conduct of provincial elections, and having committed illegal and corrupt acts in the Province in connection therewith:—

Held, that their foreign nationality or residence did not exempt them from the penal consequences of their violations of the Election Act, R.S.O. 1897, ch. 9.

Held, also, that they had been properly served outside the jurisdiction under Con. Rule 162 (e) made applicable to proceedings in Election Courts by Rule LXIV., passed December 23rd, 1903.

Held, further, that transportation by public steamboat does not come within the words "hire a horse, cab, cart, waggon, sleigh, carriage, or other conveyance . . . for the . . . transportation of voters," in sec. 165 of the Ontario Election Act, R.S.O. 1897, ch. 9, making illegal the hiring of such vehicles by candidates to convey electors to or from the polls. *In re Sault Ste. Marie Provincial Election, 1903. Galvin and Coyne Cases*, 356.

4. *Penalty—Ontario Election Act—Disqualified Person Voting—"Postmasters in Cities"—Sub-postmaster.*]—A sub-postmaster in full charge of a post office, though not the principal post office, in a city or town, is a "postmaster," within the meaning of sec. 4 of the Ontario Election Act, and is liable to the penalty imposed by that section if he votes at an election for the Legislative Assembly. *Lancaster v. Shaw*, 604.

PARTIES.

Election as to which Defendant, Plaintiff should Proceed against—Joint Tort Feasors—Con. Rule 186—3 Edw. VII. ch. 19, sec. 609 (O.).]—In an

action for damages against the corporation of a city for allowing planks and lumber to remain on one of its streets, which had been negligently piled and wrongfully left there by the other defendants, and which fell on the plaintiff and injured him :—

Held, that the defendants were not joint tort feasons and that Con. Rule 186 was not so amended by 3 Edw. VII. ch. 19, sec. 609 (O.) as to authorize the action as constituted, and plaintiff was ordered to elect against which defendant he would proceed.

Hinds v. The Corporation of the Town of Barrie (1903), 6 O.L.R. 656; *Rice v. Town of Whitby* (1898), 25 A.R. 191, and *Chandler and Massey, Limited, v. Grand Trunk R.W. Co.* (1903), 5 O.L.R. 589, followed.

Tate v. Natural Gas and Oil Co. of Ontario (1898), 18 P.R. 82, and *Langley v. Law Society of Upper Canada* (1902), 3 O.L.R. 245, distinguished. *Baines v. City of Woodstock et al.*, 694.

PARTNERSHIP.

Dissolution of—Evidence—Continued use of Firm Name—Omission to give Notice of Dissolution or File Certificate—Treasurer of Corporation—Mixing of Funds—Liability.]
—On the evidence set out in this case a partnership in a private banking business which

had existed between the defendant and one H. was held to be dissolved; but, as the business continued to be carried on in the firm name, and no notice of the dissolution was given, or any certificate thereof under the Copartnership Act R.S.O. 1887, ch. 130, sec. 7, was filed, the defendant's liability to persons dealing with the firm continued.

After the dissolution of the partnership, H., who was also treasurer of a municipal corporation, received, as such, moneys belonging to the corporation, out of which, and other moneys, he made certain payments for the corporation and deposited the balance in a chartered bank where the firm kept its account, subsequently using it in the firm's business :—

Held, that the defendant was not liable therefor, for in dealing with the moneys H. did so either as the corporation's authorized agent or in breach of his duty; if as agent, his knowledge that the defendant was not a partner must be attributed to the corporation; and, if in breach of his duty, his improperly mixing them with his own moneys, in which the defendant had no interest, could not render the defendant liable. *Town of Oakville v. Andrew*, 709.

See ARBITRATION—EVIDENCE, 3, EXECUTION.

PAYMENT.

See MORTGAGE, 2.

PAYMENT INTO COURT.*See* INTEREST.**PENALTY.***See* PARLIAMENT, 4.**PERJURY.***See* CRIMINAL LAW, 3—JUDGMENT.**PLEADING.***See* PRACTICE.**PLEDGE.***See* COLLATERAL SECURITY.**POLICY.***See* INSURANCE.**POSTMASTER.***See* PARLIAMENT, 4.**POWER.***See* WILL, 9.**POWER OF SALE.***See* WILL, 5.**PRACTICE.**

1. *Jury Notice — Action against Municipal Corporation — Non-repair of Highway — Judicature Act, sec. 104.*—In an action for damages for injuries sustained by the plaintiff from a fall upon a highway

under the control of the defendant municipality, the statement of claim alleged that the accident to the plaintiff was caused by the faulty, improper, and negligent construction of the pavement, which, being built upon an incline and having a smooth surface, "would call for the ordinary rough finish which it is customary and prudent to build under said conditions:"—

Held, that the action was for "injuries sustained through non-repair" of the highway, within the meaning of sec. 104 of the Judicature Act, R.S.O. 1897, ch. 51, and that a jury notice was therefore irregular. *Armour v. Town of Peterborough*, 306.

2. *Dismissal of Action—Default of Plaintiff—Application for Relief—Service on Defendant's Solicitor—Duration of Retainer—Jurisdiction of Master in Chambers—Solicitor's Slip—Statute of Limitations.*—Wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358, and so long as that Rule can be invoked the action is still pending, and the solicitor on the record is still solicitor until a change has been made as directed in Rule 335.

The Master in Chambers has jurisdiction under Rule 358 to set aside an order dismissing the action for default of compliance with an order for security for costs.

Where, owing to the neglect or forgetfulness of the plaintiff's solicitor, security for costs was

not furnished within the time allowed, and the defendant obtained an *ex parte* order dismissing the action, the plaintiffs were allowed, upon terms, to give security and proceed with the action, it appearing that the Statute of Limitations would be a bar to a new action. *Muir et al. v. Guinane*, 367.

3. *Close of Pleadings—Lapse of Time—Direction of Court—Rules 263, 612.*]—The noting of the pleadings as closed being a mere preliminary step to a motion for judgment or other kindred relief to ensue thereupon, by analogy to the practice prescribed by Rule 612, the officer of the Court should not, notwithstanding the terms of Rule 263, in any case in which more than a year has expired since the time at which the party seeking to have the pleadings noted became entitled to that relief, note the pleadings closed without the direction of the Court or a Judge; and, unless in exceptional circumstances, that direction should not be given without notice to the party to be adversely affected by such noting. *Radford v. Barwick et al.*, 720.

PRECEDENTS.

See *BILLS OF EXCHANGE*, 3.

PRESCRIPTION.

See *INJUNCTION*.

PRINCIPAL AND AGENT.

See *MORTGAGE*, 2.

PRIVILEGE.

See *EVIDENCE*.

PROCEDURE.

See *MUNICIPAL CORPORATIONS*, 7.

PRODUCTION.

See *EVIDENCE*.

PROHIBITION.

See *DIVISION COURT*, 2.

PROXIMATE CAUSE.

See *NEGLIGENCE*.

PUMPING MACHINERY.

See *WATER AND WATER-COURSES*, 2.

RAILWAY.

1. *Bondholders — Right to Vote — Scope of — Number of Votes — Construction of Statutes — 36 Vict. ch. 73, sec. 15 (O.) — 45 Vict. ch. 61, secs. 6, 7 (O.).*] — A Provincial Act applicable to the bonds of a railway company provided that — "In the event at any time of the interest upon the bonds remaining unpaid and owing, then at the next ensuing general annual meeting of the said company

all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders":—

Held, that the bondholders' right to vote might be exercised at any time when interest was in arrear, and was not restricted to the one general annual meeting next after the interest fell into arrear.

Held, also, OSLER and MACLAREN, JJ.A., dissenting, that each bondholder had one vote for every \$100 of his bond, the shares being \$100 shares.

Held, per OSLER and MACLAREN, JJ.A., that each bondholder had as many votes as he had bonds and no more. *Weddell et al. v. Ritchie et al.*, 5.

2. *Disorderly Passenger — Expulsion from Train—Fatal Accidents Act — Evidence of Negligence — Damages — Remoteness.*]—A passenger traveling from Detroit to Buffalo on defendants' train, who was somewhat excited from liquor, but physically capable of taking care of himself, was guilty of several disorderly acts, amongst others of molesting fellow-passengers. He was put off the train at Bridgeburg, a station near the Canadian end of the International Railway Bridge crossing the Niagara River, and about a mile distant from his destination. He followed the train on foot and after a scuffle with the bridge guard jumped

or fell off the bridge into the river and was drowned:—

Held, that the defendants were justified in putting him off the train, and were neither obliged to put him under restraint and carry him to Buffalo, nor to place him in charge of some one at Bridgeburg.

On the evidence it was impossible to say whether deceased fell off the bridge accidentally or threw himself off; or that his death was the natural or probable result of his being removed from the train.

Held, also, that there was no evidence of any negligence on the part of the defendants to be submitted to a jury.

Judgment of BRITTON, J., 7 O. L. R. 690, reversed. *Delahanty v. Michigan Central R. W. Co.*, 388.

3. *Gross Negligence—Gratuitous Passenger — Consideration—Free Pass—Liability—Limitation of Actions*—"By Reason of the Railway."—The plaintiff brought an action for damages for injuries received in an accident while travelling on an unconditional free pass upon the defendants' railway. The only evidence of negligence was that there was a head-on collision between two cars on the defendants' line managed by the defendants' servants:—

Held, that this being *prima facie* evidence of negligence, and even of gross negligence, if such were necessary, as to

which *quære*—the plaintiff was entitled to recover.

Held, also, that although brought more than six months after the happening of the accident, the action was not barred under the limitation clause of the General Railway Act, R.S.O. 1897, ch. 207, sec. 42, incorporated into the defendants' special Act—because it was based on the defendants' breach of their common law duty, founded on their undertaking to carry the plaintiff safely, and not on injury sustained "by reason of the railway" within the meaning of that clause.

Semble, that the words "may prove that the same was done in pursuance of and by authority of this Act and the Special Act" in the latter part of R.S.O. 1897, ch. 207, sec. 42 (1), mean no more than "may prove that the damage or injury was sustained by reason of the railway," as in the earlier part of the section. *Ryckman v. The Hamilton, Grimsby and Beamsville Electric R. W. Co.*, 419.

4. *Expropriation of Land—Owner—Trustee—Notice.*—A bare trustee of land is not "the owner of the land or the person empowered to convey the land, or interested in the land sought to be taken," within the meaning of sec. 71 of the Dominion Railway Act, 1903; and notice under that section must be served upon all the *cestuis que trust*. *Re James Bay R. W. Co. and Worrell et al.*, 740.

See NEGLIGENCE — STREET RAILWAYS.

RAPE.

See SEDUCTION.

RECOGNIZANCE.

See SESSIONS.

REDUCTION OF DAMAGES.

See DAMAGES, 1.

RELEASE.

Repudiation—Fraud—Restoration of Money Paid—Negligence—Fatal Accidents Act—Expectation of Benefit.—Upon appeal by the defendants from the judgment of a Divisional Court, 8 O.L.R. 499, as to some of the questions arising in the action, and upon cross-appeal by the plaintiff upon one question:—

Held, affirming the judgment, that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence; that the plaintiff was not entitled to recover any damages on behalf of the mother of the deceased; and that the release was procured from the plaintiff under circumstances that rendered it invalid as a bar to the plaintiff's claim.

It was argued before the Court of Appeal that because the plaintiff, while repudiating the release, had not restored or

offered to restore the money paid as the consideration for her executing it, she was not in a position to attack the transaction :—

Held, that the plaintiff had not before action elected to affirm or disaffirm the transaction, and the bringing of the action was a declaration of intention to disaffirm. The release having been found invalid, the plaintiff should not be deprived of the benefit of that finding; but, being relieved, she should be required to return or otherwise make good the money paid to her; and she was permitted to bring it into Court.

Hewson v. Macdonald (1882), 32 C.P. 402, distinguished.

Clough v. London and North Western R. W. Co. (1871), L.R. 7 Ex. 26, followed. *Doyle v. Diamond Flint Glass Co.*, 567.

RELIGIOUS SOCIETY.

See WILL, 4.

RESCISSION.

See MUNICIPAL CORPORATIONS, 9.

RES JUDICATA.

See HIGH SCHOOLS—JUDGMENT.

RESTRAINT ON ALIENATION.

See WILL, 3.

RETAINER.

See PRACTICE.

REVENUE.

Succession Duty—Appraisement of Property by Sheriff—Appeal to Surrogate Judge—Amount Exceeding \$10,000—Further Appeal to High Court—Gift—Contemplation of Death—Deed Executed more than Year—Change of Possession—Valuation of Shares—R.S.O. 1897, ch. 24.—From the appraisement and assessment of a testator's estate by the sheriff, the Provincial Treasurer appealed under sec. 7 of the Succession Duty Act, R.S.O. 1897, ch. 24, to the Surrogate Judge, the notice of appeal stating that he appealed on the following amongst other grounds, the grounds stated being as to the sheriff not including in the appraisement the value of the homestead property, and the household goods valued at \$7,680 and \$1,000 respectively. The testator had more than a year before his death, and while in comparatively good health, conveyed the homestead to his two daughters in fee, the conveyance being at once registered. No change of possession however took place, the testator continuing to live in the house until his death. The Surrogate Judge, on the appeal, fixed the value of the estate at \$197,152.27, refusing to include the homestead property, but including

the value of the household goods:—

Held, that the Provincial Treasurer came within the meaning of "any person," etc., contained in sec. 9 of the Act so as to have the right of appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisal being open to appeal; and the appeal being for an amount in excess of \$10,000, there was a further appeal to a Judge in Court.

Held, also, that the conveyance to the daughters of the homestead property could not be deemed to have been made in contemplation of death within sec. 4, sub-sec. (b); but that it came within sub-sec. (c) of that section, which is to be read in connection with the interpretation section, sec. 2, whereby "property" includes real as well as personal estate, and was subject to duty. *In the matter of the Estate of George Roach*, 208.

See ATTORNEY-GENERAL FOR ONTARIO v. LEE, 79—WILL, 8.

RIVERS AND STREAMS.

See WATER AND WATERCOURSES.

REVIVOR

See EXECUTORS AND ADMINISTRATORS.

ROADS.

See WAY.

SALE OF GOODS.

See COLLATERAL SECURITY—
DEFAMATION.

SCHOOLS.

1. *High Schools—Payment for County Pupils—Settlement of Amount—Reference to County Judge—Absence of Jurisdiction—Dismissal of Action to Restrain—Reference—Res judicata—High Schools Act—1 Edw. VII. ch. 40, sec. 34, sub-sec. 3 (O.).*—Sub-sec. 3 of sec. 34 of the High Schools Act, 1 Edw. VII. ch. 40 (O.), which enables the amount to be paid annually by the county for the maintenance of county pupils in a high school to be settled by mutual agreement between the trustees and the county, or on their failure to do so authorizes either party to refer their dispute to the county Judge, who is thereby empowered to settle the same, deals merely with the question of the settlement of such amount, so that there is no jurisdiction to enter upon a reference as to whether the amount paid in a specified year was for that or a prior year, and—the evidence disclosing that the amount so paid was for such specified year—an award fixing the amount payable for such year was held to be invalid.

The making of the award and the dismissal of an action brought to restrain proceedings on the reference therefor, but without any declaration being made as to the rights of the parties, did

not create an estoppel so as to prevent the question of the validity of the award being afterwards raised.

When, therefore, an action was brought to recover the amount fixed by the award, such action was held not to be maintainable and was dismissed.

Judgment of Britton, J., reversed. *The Board of Education for the City of Windsor v. The Corporation of the County of Essex*, 60.

2. *Separate Schools—Adjoining Municipalities—Three Mile Limit—Separate School Supporters—Notice—Recovery of Taxes.*—Supporters of a separate school resident in a town may, by proper notice, become supporters of the nearest separate school in an adjoining rural municipality, within three miles distance; and the High Court has power, in an action brought by the trustees of the rural separate school section against the town corporation, to adjudge that taxes levied and collected from ratepayers of the defendant municipality, being Roman Catholics, who gave the required notice shall be paid over to the plaintiffs.

Judgment of Boyd, C., varied. *Sandwich East (No. 1) Roman Catholic Separate School Trustees v. Town of Walkerville*, 214.

See SESSIONS.

SECURITY FOR COSTS.

See COURT OF APPEAL, 3—SOLICITOR, 2.

SEDUCTION.

Evidence of Plaintiff's Daughter—Rape—Question for Jury.—In an action by a father for the seduction of his daughter, the jury disagreed, and a motion was made by the defendant, under Rule 780, for judgment dismissing the action.

The plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. The daughter was not in the plaintiff's service or living at home at the time of the seduction:—

Held, that it was for the jury to say, on the evidence of the daughter (even if no other evidence was given), whether or not they accepted her whole statement; they might be satisfied as to the connection and paternity, and discredit the evidence of force.

Vincent v. Sprague (1847), 3 U.C.R. 283, and *Brown v. Dalby* (1850), 7 U.C.R. 160, discussed.

Judgment of Teetzel, J., reversed. *E. v. F.*, 489.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SERVICE.

See CONTEMPT OF COURT—DIVISION COURT, 1.

SERVICE OUT OF JURISDICTION.

See PARLIAMENT, 3.

SESSIONS.

Summary Conviction—Appeal to Sessions—Form of Recognizance—Payment of Fine—Repayment on Allowance of Appeal—Costs—Public Schools Act, sec. 103.]—A person elected as school trustee, who has under the provisions of sec. 103 of the Public Schools Act (R.S.O. 1897, ch. 292), been ordered by a justice of the peace to pay a fine of \$20 because of alleged refusal to perform the duties of the office has, having regard to the provisions of sec. 7 of the Ontario Summary Convictions Act (R.S.O. 1897, ch. 90), a right to appeal to the general sessions.

Payment of the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress.

In re Justices of York and Peel, Ex parte Mason (1863), 13 C.P. 15, followed. *Rex v. Neuberger* (1902), 9 B.C.R. 272, distinguished.

A recognizance to appear at the general sessions and "enter an appeal" is sufficient.

Rex v. Geiser (1901), 21 C.L.T. Occ. N. 604, distinguished.

Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered.

Regina v. McIntosh (1897), 28 O.R. 603, followed. *Rex v. Tucker*, 506.

SET-OFF.

See COMPANY, 3.

SHARES.

See BILLS OF EXCHANGE, 2—BROKER—COMPANY—CRIMINAL LAW, 4—REVENUE.

SIDEWALKS.

See MUNICIPAL CORPORATIONS, 5—WAY, 2.

SLANDER.

See DEFAMATION.

SOLICITOR.

1. *Taxation of Bill of Costs—Reference as to—Illness of Deputy-Registrar—Change of Reference.*]—A deputy-registrar to whom a reference had been made of a solicitor's bill of costs fell ill after the evidence and arguments were all in but before judgment was given and had not been able to attend to his duties for nearly a year.

On an application by the client to change the reference to one of the taxing officers at Toronto, which was opposed by the solicitor:—

Held, that the proper course was to refer the matter to the

deputy clerk of the Crown. *Re Solicitor*, 393.

2. *Lien—Money Paid into Court as Security for Costs—Priority of Execution Creditor—Stop Order.*—Money paid into Court by a plaintiff in an action, as security for costs, is not property “recovered or preserved” by the solicitor for the plaintiff within the meaning of Con. Rule 1129 on which the solicitor’s lien for costs will attach as against an execution creditor who has obtained a stop order.—*Gibson v. Le Temps Publishing Co.*, 434.

SPECIFIC PERFORMANCE.

See STREET RAILWAYS, 2—
VENDOR AND PURCHASER, 1.

STATUTE OF DISTRIBUTIONS.

See DISTRIBUTION OF ESTATES.

STATUTES.

See MUNICIPAL CORPORATIONS,
7—WILL, 4.

STATUTES CONSIDERED.

22 & 23 Car. II. ch. 10.
See DISTRIBUTION OF ESTATES, 2.

36 Vict. ch. 73, sec. 15 (O.)
See RAILWAY, 1.

45 Vict. ch. 61, secs. 6, 7 (O.)
See RAILWAY, 1.

50 Vict. ch. 91 (O.)
See WILL, 4.

54 Vict. ch. 18, sec. 1 (O.)
See MORTGAGE, 3.

55 & 56 Vict. ch. 29, secs. 191, 192 (D.)
See CRIMINAL LAW, 1.

55 & 56 Vict. ch. 29, sec. 195 (D.) ...
See CRIMINAL LAW, 2.

55 & 56 Vict. ch. 29, sec. 201 (D.) ...
See CRIMINAL LAW, 4.

55 & 56 Vict. ch. 29, sec. 207 (D.) ...
See CRIMINAL LAW, 5.

55 & 56 Vict. ch. 29, sec. 691 (D.) ...
See CRIMINAL LAW, 3.

55 & 56 Vict. ch. 29, sec. 746 (f) (D.)
See CRIMINAL LAW, 3, 4.

60 Vict. ch. 14, sec. 29 (O.)
See MORTGAGE, 3.

60 & 61 Vict. ch. 11 (D.)
See ALIEN LABOUR ACT.

R.S.O. 1897, ch. 9, sec. 4.
See PARLIAMENT, 4.

R.S.O. 1897, ch. 9, secs. 162, 165, 166,
188.
See PARLIAMENT, 3.

R.S.O. 1897, ch. 9, sec. 189.
See PARLIAMENT, 1.

R.S.O. 1897, ch. 24, sec. 4.
See REVENUE.

R.S.O. 1897, ch. 24, secs. 7, 9.
See REVENUE.

R.S.O. 1897, ch. 51, sec. 104.
See PRACTICE.

R.S.O. 1897, ch. 60, sec. 72 (d)
See DIVISION COURT, 2.

R.S.O. 1897, ch. 88.
See CONSTABLE.

R.S.O. 1897, ch. 90, sec. 7.
See SESSIONS.

R.S.O. 1897, ch. 112, secs. 3, 4, 8.
See WILL, 4.

R.S.O. 1897, ch. 119, sec. 15.
See VENDOR AND PURCHASER, 2.

R.S.O. 1897, ch. 121, sec. 13.
See MORTGAGE, 3.

R.S.O. 1897, ch. 128, sec. 27.
See WILL, 2.

R.S.O. 1897, ch. 128, sec. 37.
See WILL, 1.

R.S.O. 1897, ch. 129, sec. 10.....
See EXECUTORS AND ADMINISTRATORS.

R.S.O. 1897, ch. 129, secs. 37 to 55...
See DISTRIBUTION OF ESTATES, 2.

R.S.O. 1897, ch. 142, secs. 11, 13....
See WATER AND WATERCOURSES, 1.

R.S.O. 1897, ch. 153, sec. 2, sub-secs.
 3 and 4.
See MECHANICS LIEN.

R.S.O. 1897, ch. 157, sec. 3.....
See EVIDENCE, 3.

R.S.O. 1897, ch. 163, sec. 4.
See HUSBAND AND WIFE, 2.

R.S.O. 1897, ch. 191, sec. 26.....
See COMPANY, 5.

R.S.O. 1897, ch. 191, sec. 37....
See COMPANY, 3.

R.S.O. 1897, 191, sec. 47.....
See COMPANY, 1.

R.S.O. 1897, ch. 203, sec. 85.....
See INSURANCE.

R.S.O. 1897, ch. 203, sec. 143.....
See INSURANCE.

R.S.O. 1897, ch. 203, sec. 159
See HUSBAND AND WIFE, 2—INSURANCE, 2.

R.S.O. 1897, ch. 205, sec. 117 (4)....
See COURT OF APPEAL, 2.

R.S.O. 1897, ch. 207, sec. 42.....
See RAILWAY, 3.

R.S.O. 1897, ch. 226, sec. 73
See WATER AND WATERCOURSES, 2.

R.S.O. 1897, ch. 245, secs. 20 to 29...
See MUNICIPAL CORPORATIONS, 8.

R.S.O. 1897, ch. 292, sec. 103.....
See SESSIONS.

R.S.O. 1897, ch. 307, sec. 24.....
See WILL, 4.

1 Edw. VII. ch. 13 (D.).....
See ALIEN LABOUR ACT.

1 Edw. VII. ch. 25, sec. 1 (O.).
See STREET RAILWAYS, 4.

1 Edw. VII. ch. 30, sec. 4
See WATER AND WATERCOURSES, 2.

1 Edw. VII. ch. 40, sec. 34, sub-sec.
 3 (O.)
See HIGH SCHOOLS.

2 Edw. VII. ch. 2, sec. 7 (O.).....
See WILL, 4.

3 Edw. VII. ch. 19, sec. 373 (O.)
See MUNICIPAL CORPORATIONS, 7.

3 Edw. VII. ch. 19, sec. 437 (O.)....
See WAY, 4.

3 Edw. VII. ch. 19, sec. 606 (O.).....
See WAY, 3.

3 Edw. VII. ch. 19, sec. 609 (O.) ...
See PARTIES.

3 Edw. VII. ch. 58, sec. 71 (D.).....
See RAILWAY, 4.

4 Edw. VII. ch. 10, sec. 21 (O.)
See PARLIAMENT, 1.

4 Edw. VII. ch. 11 (O.)
See COURT OF APPEAL, 2.

STAYING ACTION.

See ARBITRATION AND AWARD.

STAYING PROCEEDINGS.

See COURT OF APPEAL, 3.

STOCK GAMBLING.

See CRIMINAL LAW, 4.

STOP ORDER.

See SOLICITOR, 2.

STREET RAILWAYS.

1. *Contract with Municipality—Payment of Percentage on Gross Receipts—Intra Vires—Meaning of "Gross Receipts."*
 —Held, affirming the judgment of MEREDITH, J., 8 O.L.R. 455, that the agreement between the parties for the payment by the defendants to the plaintiffs of a

certain percentage of the defendants' gross receipts was *intra vires* of both; that the term "gross receipts" included fares paid by passengers outside the limits of the city of Hamilton; and that the term also included moneys received from the sale of tickets which might possibly not be used in payment of fares. *City of Hamilton v. Hamilton Street R. W. Co. (No. 1)*, 575.

2. *Contract with Municipality—Intra vires—"Workmen's Tickets"—Action to Enforce Contract—Parties—Attorney-General—Specific Performance—Injunction.*]—*Held*, affirming the judgment of STREET, J., 8 O.L.R. 642, that the agreement of which the enforcement was sought in this action was *intra vires*; that by the terms of the agreement the defendants were bound to sell on their cars tickets known as "workmen's tickets" or "limited tickets," and to receive them from all persons tendering them as fares during certain specified hours of the day; that the plaintiffs could maintain the action without the aid of the Attorney-General; and that performance of the contract could be enforced by the Court by injunction.

City of Kingston v. Kingston, etc., Electric R. W. Co. (1898), 25 A.R. 462, distinguished. *City of Hamilton v. Hamilton Street R. W. Co. (No. 2)*, 594.

3. *Toronto Railway Co.—Time Tables—Routes—Open Cars—Night Cars.*]—Upon an

appeal by the defendants and a cross-appeal by the plaintiffs the judgment of ANGLIN, J., reported 9 O.L.R. 333, as to the construction in certain respects of the agreements between the City of Toronto and the Toronto Railway Company was affirmed except as to the running of night cars, the Court of Appeal being of opinion, reversing the judgment below on this point, that a car which starts on its route before midnight must finish its route even if it has to run after midnight to do so. *City of Toronto v. Toronto Railway Co.*, 657.

4. *Operation of Cars—Fender—"Front" of Motor Car—Penalty—1 Edw. VII. ch. 25 (O.).*]—By Edw. VII. ch. 25, sec. 1 (O.), it is provided that a street railway company, when operating any portion of their line by means of electricity, shall use "in the front of each motor car a fender?"—

Held, that what is meant by the "front" of the car is that end of it which when the car is in motion is the furthest forward, that is to say, furthest forward in the sense that it would first meet a person or an object moving in the opposite direction; and the defendants operating a car for a distance of twelve hundred feet with the fender at the back instead of the front, as so defined, were liable to the penalty prescribed by the statute.

Judgment of the county court of York affirmed. *City of*

Toronto v. Toronto R.W. Co.,
730.

See CRIMINAL LAW, 1.

SUBPENA.

See CONTEMPT OF COURT.

SUBSCRIPTION.

See COMPANY, 4.

SUCCESSION DUTY.

See REVENUE—WILL, 8.

TAXATION.

See COSTS—SOLICITOR, 1.

TIMBER.

Sale — Contract — Time for Removal.]—In 1889 the plaintiff contracted with the defendant B, by an instrument under seal, to sell to the latter certain kinds of timber from the plaintiff's land, "now upon" the lots described, and so much thereof as the purchaser might see fit to cut and remove, with the right of entry "at all times" until removed, the timber removed to be paid for at certain specified prices:—

Held, that the agreement being silent as to the duration of the right to cut and remove, it must be exercised within a reasonable time; and B. and his

assigns, not having attempted to exercise the right until 1903, should be enjoined from doing so. *Dolan v. Baker et al.*, 259.

See EXECUTION.

TIME.

See TIMBER.

TOLLS.

See WATER AND WATER-COURSES, 1—WAY, 5.

TORONTO RAILWAY COMPANY.

See STREET RAILWAYS.

TRADEMARK.

Criminal Law—Forgery of Trademark.—*Criminal Code*, sec. 447—*Descriptive Words*—"Glyco-thymoline."—A person prosecuted under sec. 447 of the Criminal Code for forging a trademark or for falsely applying to goods a mark so nearly resembling a trademark as to be calculated to deceive is entitled to shew in his defence, just as under *Partlo v. Todd* (1888), 17 S.C.R. 196, and *Provident Chemical Works v. Chemical Manufacturing Co.* (1902), 4 O.L.R. 546, he might do in answer to an action for infringement, that the trademark in question is invalid, its registration not being conclusive.

The section of the Criminal Code in question does not apply

to a case of "passing off" goods as those of another.

The words "glyco-thymoline" as applied to a compound of glycerine and thymol are descriptive merely and are not properly the subject of a trademark.

Conviction quashed. *Rex v. Cruttenden*, 80.

TRADE UNION.

See ATTACHMENT OF DEBTS—MASTER AND SERVANT, 2.

TRANSFER.

See COMPANY, 1.

TRESPASS.

See CONSTABLE.

TRUST.

See COMPANY, 2—MORTGAGE, 3—RAILWAY, 4.

VAGRANCY.

See CRIMINAL LAW, 5.

VENDOR AND PURCHASER.

1. *Contract for Purchase of Land—Negotiations—Incomplete Contract—Specific Performance.*—The plaintiffs' solicitor wrote to the defendant suggesting that the latter should offer \$13,000 for a farm owned by the plaintiffs, of which the defendant had a lease. The defendant wrote in answer, "I have concluded to purchase the

farm at your price, \$13,000;" and the plaintiffs' solicitor replied, "I accept your offer of \$13,000." In none of these letters was anything said about the terms of purchase, except that in the first the solicitor stated that the terms of payment could be made very easy. At a subsequent interview between the defendant and the solicitor, terms of payment were discussed, and the solicitor made an informal memorandum of the mode, time, and amount of payments to be made by the defendant, which the defendant signed, but refused to sign a formal agreement afterwards drawn up by the solicitor, containing the same provisions with the addition of one for payment of interest:—

Held, that no completed contract had been established; and an action to compel specific performance was dismissed.

Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs (1890), 44 Ch. D. 616, and *Hussey v. Horne-Payne* (1879), 4 App. Cas. 311, followed. *Queen's College v. Jayne*, 319.

2. *Incumbrance—Lis Pendens—Adverse Claims to Purchase Money—Interpleader—Rule 1103 (a).*—A certificate of *lis pendens* is not an incumbrance within the meaning of R.S.O. 1897, ch. 119, sec. 15.

One who had contracted to purchase land was sued by his vendor for the purchase money, and an action was brought in respect of the same land by

creditors of the vendor's husband, seeking to set aside a conveyance of the land by the husband to the wife:—

Held, that, although the purchase money was not actually claimed in the latter action, yet, as the plaintiffs therein appeared upon an interpleader application by the purchaser and stated their willingness that the purchase should be carried out, the purchase money being applied to pay the debts of the husband, they were making an "adverse claim" to the purchase money, within the meaning of Rule 1103 (a), and the purchaser was entitled to an interpleader order.

Decision of ANGLIN, J., reversed. *Molsons Bank v. Eager*, 452.

See MUNICIPAL CORPORATIONS, 9.

WAIVER.

See ARREST—COMPANY, 6.

WALL.

See DEED.

WATER AND WATERCOURSES.

1. *Improvements on Stream—Floating Logs over—Reasonable Tolls—Order for—Restriction to Future Tolls—R.S.O. ch. 142, secs. 11, 13.*—The reasonable tolls which, under secs. 11 and 13 of the Rivers and Streams Act, R.S.O. 1897, ch. 142, the person who has made

improvements on a stream is entitled to recover on logs floated over them, are those chargeable on logs floated after but not before the making of the order of the county or district Judge, under section 13. *Beck v. Ontario Lumber Company*, 193.

2. *Drainage of Lands—Pumping Machinery—Negligent Operation of—Lands Injurious Affected by—Damages—Drainage Act, R.S.O. 1897, ch. 226, sec. 73, 1 Edw. VII. ch. 30, sec. 4.*—Persons whose lands are injuriously affected by the non-operation, or imperfect or negligent operation of pumping machinery constructed under the Drainage Act, R.S.O. 1897, ch. 226, are entitled to damages under the provisions of sec. 73, of that Act, and sec. 4 of 1 Edw. VII. ch. 30 (O.).

Where therefore the plaintiff's lands and crops were injured by the overflow of water caused by the neglect of the corporation to efficiently operate the pumping plant erected in connection with certain drainage works constructed by the township, the plaintiff was held entitled to recover damages for the injury he had sustained, one half of which was imposed on the general funds of the township, and the other half on the area benefited. *Bradley v. The Corporation of the Township of Raleigh*, 201.

See INJUNCTION — NEGLIGENCE, 1.

WATERWORKS.

See MUNICIPAL CORPORATIONS, 3.

WAY.

1. *Dedication of Highway*—*Public User*—*Crown Lands*—*Locatee*—*Acquiescence*—*Subsequent Grant without Reservation*—*Rights of Public*—*Order of Sessions*.]—In 1834 an order of the quarter sessions was made under 50 George III. for the opening of a highway through several lots, the title to one of which was still in the Crown, although it had been recently occupied under a license from the Crown. The road described in the order was never opened, but another road, following the same general direction, was opened across this lot and others in 1835 or 1836, and was ever after regularly travelled and used as a highway, fenced off from the lot referred to, improved from time to time by statute labour and public money, and treated by the locatee and his successors in title as a public highway. In 1904, the plaintiff, claiming to be the successor in title of the original locatee, established his right, to the satisfaction of the Crown, and a patent was issued to him, in which no reservation or mention of any road was made:—

Held, that the road in question had become established as a public highway, the plaintiff had no right to close it, and the defendant, as one of the public, had a right to remove the plain-

tiff's obstructions, and was not liable in trespass for having done so.

There was evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a sessions order was made for the establishment of a highway, but never acted upon, was no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication. *Fraser v. Diamond*, 90.

2. *Non-repair of Highway*—*Injury to Pedestrian*—*Sidewalk*—*Negligence*—*Supervision*—*Notice*.]—In an action for damages for injuries sustained by the plaintiff from a fall upon a sidewalk in a town, it appeared that the defect in the sidewalk was slight in character—not conspicuous or notorious—on a street comparatively little frequented, over which there was weekly supervision, and that the defect had not existed more than six days before the plaintiff was hurt, was not actually noticed by any officer of the municipality, and that no complaint was lodged.

Held, that notice of the condition of the sidewalk was not to be attributed to the municipality. *McNiroy v. Town of Bracebridge*, 360.

3. *Non-repair*—*Negligence of Municipal Corporation*—*Notice of Accident*—*Reasonable Excuse for Want of*.]—While the plaintiff was engaged in driving a watering-cart along the street, the surface suddenly

gave way, and the cart falling, or partly falling, into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe which had been laid some 12 or 14 feet below the surface of the ground about twenty years before and which for 18 years had given no indications of being out of repair. In an action to recover damages for the injuries, the negligence alleged was, that the street was at this time, and for a long time previous had been, out of repair and dangerous for travel, to the knowledge of the defendants; that the bed of the street was of quicksand; and that the sewer pipe had been improperly and negligently laid therein :—

Held, upon the evidence, reversing the judgment of a Divisional Court, 8 O.L.R. 391, that there was not sufficient evidence of the existence of surface indications of danger below, which the defendants could be charged with negligence in not having attended to before the day of the accident; and that, in the circumstances, negligence could not be imputed to the defendants either in the original construction of the sewer or the absence of subsequent examination and inspection.

Semble, as regards the question whether there was reasonable excuse for omission to give the statutory notice of the accident under sec. 606 of the Municipal

Act, 3 Edw. VII. ch. 19 (O.), that which may constitute reasonable excuse is not defined and must depend very much upon the circumstances of the particular case. Where there is actual knowledge or verbal notice, it may be regarded as an element of the excuse, but something more is required. The fact of the accident, by itself, is not a reasonable excuse, if it is not accompanied by some disabling circumstance. The plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance of the law.

Armstrong v. Canada Atlantic R. W. Co. (1902), 4 O.L.R. 560, referred to. *O'Connor v. City of Hamilton*, 529.

4. *Closing Highway—Property Injurious Affected—Municipal Corporations—Municipal Act, 1903, sec. 437.*—A property on the west side of a street running north and south was held to have been “injuriously affected” within the meaning of sec. 437 of the Municipal Act, 1903, by the closing of a street running from the first street in an easterly direction opposite the property in question and an award of compensation by the official arbitrator to the owner of the property was upheld, the principle of *Metropolitan Board of Works v. McCarthy* (1867), L.R. 7 H.L. 243, being applied. *In re Tate and the City of Toronto*, 651.

5. *Toll Roads Expropriation—Costs of Arbitration—Toll*

Roads Expropriation Act, 1901.]—A county which, upon the petition of the ratepayers affected, presented through the medium of two interested townships, and proceeding in accordance with the provisions of the Toll Roads Expropriation Act, 1901, initiates and takes part in an arbitration to fix the value of a toll road cannot recover from the townships the costs incurred by it. *United Counties of Northumberland and Durham v. Township of Hamilton and Township of Haldimand*, 680.

See CEMETERY—MUNICIPAL CORPORATIONS—NEGLIGENCE, 1.

WILL.

1. *Construction—Devise of Lands Subject to Mortgages—Exoneration—R.S.O. 1897, ch. 128, sec. 37.*]—A testator by the 3rd clause of his will devised to his son X., after his mother's death, a certain lot in which the testator had given her a life estate; and also two other parcels. By the 4th clause he devised to his son A., a certain lot of land on condition of his paying \$1,000 to assist in paying off the mortgage on the property; but if he failed to do so, he devised the lot to his son X. By the 5th clause he devised to A. the last specified lot devised to X., X. to pay A. \$500 and to have his lands charged therewith. A refused to accept the lot firstly devised to him, tak-

ing the lands secondly devised to him. This parcel was subject to a mortgage for \$750, while all the other lands were subject to a mortgage for \$4,000:—

Held, that X. on taking the lands firstly devised to A. was not bound to pay the \$1,000 in reduction of the mortgage, the \$500 he was to pay A. being substituted for that liability.

By clause 6, 7, 8 the testator devised to his three daughters three named parcels of land; and by a codicil he directed that if the mortgage on the lands was not paid, each of his daughters should pay \$150 to assist in meeting that debt, charging the lands therewith:—

Held, that the daughters on paying the \$150 were not entitled to hold their lands exonerated from the mortgage for \$4,000 on the lands devised to them, for under sec. 37 of the Wills Act, R.S.O. 1897, ch. 128, the devise was merely of an equity of redemption and the lands were still liable to the payment of the same.

By another clause of the will of the testator directed that his wife was to have free control of his lands for ten years after his death in order to pay off the mortgage, if not paid at his death. The wife predeceased the testator:—

Held, that the trust thereby created terminated on the death of the wife. *Re Goulet*, 197.

2. *Devise—Divesting—Executory Devise—Failure of—Residuary Devise—R.S.O. ch. 128, sec. 27.*—A testator died in 1880, having by his will devised to his wife "all my real estate consisting of (the lots in question and other lots) "and also all other real estate and the personal estate which I may die seized or possessed of (1) To hold the same for the benefit of my said wife for life. (2) After the death . . . of my said wife as aforesaid to hold the same for my daughter . . . during her life . . . allowing her full free use of my said personal estate and all the rents and profits, . . . (3) From and after the death of my said daughter . . . to divide the said real and personal estate between her children in such manner as she shall by her last will and testament direct and appoint and in default of such appointment to divide the same equally between the said children, . . . (4) Notwithstanding the directions hereinbefore contained I desire that if my son . . . returns to Toronto within five years from the date of my death my said executors shall hold in trust for him from the time of his return" . . . (the lots in question) "during the term of his natural life and shall pay over to him all rents, issues and profits thereof and after his death shall divide the same between his children."

The son returned within the five years. The widow died in 1902 not having married again.

The son entered into the receipt of the rents and profits of the lots devised to him and died in 1904 intestate and unmarried:—

Held, that the contention that at most the prior interest had only been divested to the extent of the executory devise to the son for life and on his death without children the purpose of the devise was satisfied and the estate revested in the first devisees could not prevail, as the gift over was of the entire interest in the lots named, and the contingency upon which the gift over was to take effect was the son's return, and the failure of the executory devise to his children resulted only in a lapse of that devise; but *held* that the expression "also other real estate and the personal estate of which I may die seized or possessed" clearly manifested the testator's intention that there should not be a partial intestacy, and that paragraph 1 of the will contained a residuary devise, within the contemplation of sec. 27 of the Wills Act, R.S.O. ch. 128, and no contrary intention appearing, it was sufficiently comprehensive to "sweep up" the lapsed devise and pass it to the daughter. *Walsh v Fleming*, 226.

3. *Construction—Gift of Personal Property—"Before Receiving"—Rule in Shelley's case—Restraint on Alienation.*—A testator left to his wife his lands for her life together with "all my household furniture, personal property . .

to be for her use and behoof during her natural life in lieu of dower . . . and which possession is to be held by her so long as she shall remain my widow.

. . . All the personal property . . . that may be in possession of my said beloved wife at her decease and not otherwise disposed of, shall be sold by my executors . . . and the proceeds . . . equally divided among my daughters as being part of my estate:—

Held, that the widow took absolutely all the personal property which she appropriated to her own use and used up during her life, and that there was a gift over of only so much of the personal property as was in the possession of the widow at the time of her death.

The testator also directed that certain lands should at the decease of his wife be sold, and the proceeds divided among his daughters, and that if any one or more of the daughters should "be deceased before receiving her or their interest or share," her or their heirs should inherit the same; and if she had left no legal heir, then over. One of the daughters survived her mother, and became entitled to a share, but had not at her own death, actually received the whole of her share. She died unmarried:—

Held, that the share had become vested at the time of her death, and must be paid to her estate.

The testator also devised to one of his sons for his life "and his lawful heirs after him," certain lands, "to have and hold the same during his natural life, and subject to this express condition, that he shall have no power to sell . . . the above real estate, but shall transmit it to his lawful heirs unimpaired if he shall have any . . . and should he fail to have any lawful heirs, the said lands shall at his decease be sold, and the proceeds equally divided among the other legatees":—

Held, that the son took the fee under the rule in *Shelley's* case; and the restraint on alienation was invalid. *In re Estate of Charles Tuck*, 309.

4. *Gifts to Religious Societies* — "Charitable Use" — *Date of Execution of Will* — *Six Months' Limitation* — *Statutes* — *Repeal by Implication* — *Religious Institutions Act* — *Mortmain Acts* — *Construction* — "Land" — *Proceeds of Sale*.]—

A testatrix dying on the 4th June, 1904, by her will, executed on the 4th December, 1903, gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to trustees of a church, upon certain conditions, and on failure of compliance with the conditions to pay one-half of the moneys to a home missionary society and the other half to a foreign mis-

sionary society and the other half to a foreign missionary society for their sole use.

By 50 Vict. ch. 91 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate should be valid unless made by deed or will executed at least six months before the death of the testator. There is a similar provision in sec. 24 of the Religious Institutions Act, R.S.O. 1897, ch. 307:—

Held, that the six months' limitation contained in these two Acts must be regarded as having been repealed by sec. 4 of the later Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, the original of which was passed on the 14th April, 1892.

2. Gifts for religious purposes are within the term "charitable use" in sec. 4.

3. The gift was not of "land," as interpreted by sec. 3 of ch. 112, but of "personal estate arising from or connected with land," within the meaning of sec. 8.

In re Sidebottom, [1902] 2 Ch. 389, and *In re Ryland*, [1903] 1 Ch. 467, followed.

4. The statute which is now R.S.O. 1897, ch. 112, was based upon the English Act of 1891, and the Ontario Mortmain and Charitable Uses Act, 1902, upon the earlier English Act of 1888; but by sec. 1 of the Act of 1902 it is provided that that Act shall be read as part of ch. 112; and

the result is to put the two Ontario Acts practically in the same position as the two English Acts (*In re Hume, Forbes v. Hume*, [1895] 1 Ch. 422); and therefore sec. 7 of the Act of 1902 does not apply to wills, but only to assurances *inter vivos*.

Re Kinny (1903), 6 O.L.R. 459, followed. *Re Barrett*, 337.

5. *Construction — Executors — Power of Sale — Devolution of Estates Act.*—Where the authority to sell real estate is given to the executors, the fee simple is impliedly vested in them for that purpose.

The testatrix in the first part of her will gave her whole estate, real and personal, subject to the payment of debts, to her stepson and his wife and their three children, "to be divided and shared equally between them." She then proceeded: "It is my will that my personal effects that have not been disposed of during my lifetime shall be kept in the family, excepting any furniture . . . but the real estate if I have not disposed of it shall be sold and equally divided, and I appoint my stepson . . . and his daughter . . . to execute this my will."—

Held, that the right of the executors to sell the real estate of the testatrix was not affected by the Devolution of Estates Act, but that, independently of that Act, the executors had, upon the true construction of the will, an express power to sell the real estate. *Re Roberts and Brooks*, 395.

6. *Construction—Gift of “All my real estate being composed of,” etc.—After-acquired Property.*—A testator devised “all my real estate . . . being composed of the south-east part of lot 10 . . .” Afterwards he acquired the northerly half of said lot 10:—

Held, that the after-acquired property passed under the devise. *In re Smith*, 449.

7. *Gift to Religious Society—“Charitable and Philanthropic Purposes”—Validity.*—A testator gave his residuary estate “to the West Lake Monthly Meeting of Friends (Hicksite) of West Bloomfield, to be applied in charitable and philanthropic purposes, as said Monthly Meeting or Society may direct:”—

Held, that the gift was not void for uncertainty as to its objects, but was valid.

Williams v. Kershaw (1835), 5 L.J. Ch. 86, 11 Cl. & Fin. 111n., 42 R.R. 269, not followed. Decision of TEETZEL, J., affirmed. *Re Huyck*, 480.

8. *Construction—Direction to Pay Debts and Testamentary Expenses—Succession Duties—Specific Legacies—Exoneration at Expense of Residuary Legatees.*—A testator made numerous specific pecuniary bequests, and gave the residue of his estate to persons other than the specific legatees. He directed his executors to pay his just

debts and funeral and testamentary expenses:—

Held, that succession duties do not come within the description either of a debt or part of the testamentary expenses; and that the specific legacies, not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees.

Kennedy v. Protestant Orphans’ Home (1894), 25 O.R. 235, *Manning v. Robinson* (1898), 29 O.R. 483, and *Re Holland* (1902), 3 O.L.R. 406, approved.

Decision of TEETZEL, J., affirmed. *Re Bolster*, 591.

9. *Construction—Restraint on Alienation—Exercise of Power.*—A testator devised land to his daughter subject to the following conditions: “My said daughter shall not sell or will or dispose of this 100 acre lot to any person or persons except to one or more of my children or my grandchildren, to whom she may dispose of it if it is her will to do so.”

By her will, the daughter assumed to charge upon the land two legacies, and directed that her husband might occupy the land for one year after her death, and subject to these charges, and her debts and testamentary expenses, devised the land to her executors upon trust for the plaintiff, one of the testator’s grandchildren, as

beneficial owner. There were several other children and grandchildren of the testator surviving:—

Held, that the restraint on alienation in the testator's will was valid, and that, inasmuch as the daughter's will must be held to have been made by her in pursuance of the power of disposition given her by him, though she intended to defeat the restraint against alienation by indirect means, the legacies in her will failed, as also her devise of the right of occupation in favour of her husband, and the plaintiff took the whole property free from any condition. *Rogerson v. Campbell*, 748.

WINDING-UP ACT.

See COMPANY.

WITNESS FEES.

See COSTS.

WORDS.

"Adverse Claim."—*See* VENDOR AND PURCHASER, 2.

"Aggregate Value."—*See* REVENUE.

"Before Receiving."—*See* WILL, 3.

"By Reason of the Railway."—*See* RAILWAY, 3.

"Charitable and Philanthropic Purposes."—*See* WILL, 7.

"Charitable Use."—*See* WILL, 4.

"Front of Car."—*See* STREET RAILWAYS, 4.

"Glyco-thymoline."—*See* TRADEMARK.

"Gross Receipts."—*See* STREET RAILWAYS, 1.

"Incumbrance."—*See* VENDOR AND PURCHASER, 2.

"Injuriously Affected."—*See* WAY, 4.

"Intersection."—*See* DEED.

"Land."—*See* WILL, 4.

"License Year."—*See* MUNICIPAL CORPORATIONS, 8.

"Owner."—*See* RAILWAY, 4.

"Personal Estate Arising from or connected with Land."—*See* WILL, 4.

"Postmasters in Cities."—*See* PARLIAMENT, 4.

"Prospectively."—*See* DISTRIBUTION OF ESTATES, 2.

"Workmen's Tickets."—*See* STREET RAILWAYS, 2.

Ex. J. M.
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JUN 28 1934

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